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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1094

RUSSELL HAROLD SITTON and BARBARA SITTON,

versus *Petitioners,*

UNITED STATES OF AMERICA, ET AL,

Respondents.

Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

Petition For a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

---

Your movants, Russell Harold Sitton and Barbara Sitton, contended before the United States District Court for the Northern District of Texas and before the Fifth Circuit at New Orleans that prior litigation in the State Courts of Texas between petitioners and third party respondents, American Title Company, et al., could not be invoked as a bar to petitioners' claims for relief because those State Court proceedings failed to comply with the due process and equal protection guaranties of the Fourteenth Amendment.

Prior to the instant case, petitioners brought suit against third party respondents for conspiring together to alter the deed to the home which petitioners were purchasing under the G. I. Loan Program. The special issue (interrogatory) jury verdict was favorable to petitioners on every issue and they were awarded actual and exemplary damages aggregating $90,000.00. Thereafter, the State Court threw out the verdict and rendered a take-nothing judgment. Petitioners say that the State Court declaration of "no evidence to support any of the jury's findings" was simply a pretext to dispose of a case with which the Court personally disagreed. Petitioners urge that there was, as a matter of fact, ample evidence to sustain the verdict. Petitioners submit that the State Court proceedings were violative of the Fourteenth Amendment in that they were arbitrary and discriminatory and that they further violated the Seventh Amendment restriction that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Obviously, where a Federal Court recognizes and enforces a State Court proceedings as a final disposition of a controversy, then the Federal Court makes the judgment of the State Court into its own judgment. For this reason, it has been repeatedly held that the judgment of another tribunal may not be enforced unless the prior judgment complies with due process. None of the foregoing matters were considered in the opinion of the Fifth Circuit. The Court, in effect, held that it could go no further than the face of the State Court judgment.

We will be quite frank. Petitioners' entire case collapses unless there are facts in the record which uphold the petitioners' basic contention; i.e. that there was ample evidence presented in the State Court to support the jury's verdict. The rule is well established that the Supreme Court will not pass upon questions that are moot or abstract or not raised by the evidence. At the same time, the Supreme Court does not ordinarily grant certiorari to pass upon questions of fact. Before passing upon the petition for certiorari, the foundation stone of petitioners' case should be examined.

In their brief to the Fifth Circuit, petitioners presented the following point of error (Apts' Br.9):

> "POINT FIVE: The United States District Court erred in failing to examine the record of the Texas Court to determine if the proceedings complied with due process and equal protection of law."

Petitioners made the following statement (Apts' Br.4):

> "It is submitted that this appeal turns upon the two following questions:
>
> (1) If this case had originally been tried in the federal courts, was the evidence presented so weak that a federal court could have overriden the verdict without violating the jury trial provisions of the Seventh Amendment?

(2) In view of the jury trial provisions of the Texas Constitution and the Texas Rules and the fact that the jury was charged as the "exclusive judges of the facts proved," was the act of the Texas Courts in overriding the jury verdict so contrary to the established practices and procedures as to be 'fundamentally unfair?'

Appellants urgently request that the entire record be considered and that these questions be expressly answered. If they be answered in appellees' favor, appellants concede they have no recourse. It is submitted that if either of them be answered in appellants' favor, the case must be reversed."

We further urged: "In view of the probability of a certiorari petition by the losing party, we renew our request that the Court examine the record (Apts' Br.47)." The request was again made at Pages 62-63 of our brief.

Our request for findings of fact was renewed in the petition for rehearing. On Pages 4-7, we tendered specific findings of fact which we asked the Fifth Circuit to enter. All of this was overruled by the Fifth Circuit; sub silentio.

We urge in the within petition that a ruling of "no federal jurisdiction" is unprecedented in a case to which the United States is a party. The ruling of the Fifth Circuit severely impairs the power of the Federal Courts to give complete relief and constitutes a vast extension of the arbitrary and artificial rule laid down in Rooker v. Fidelity Trust Co., 263 U.S.413. Likewise,

the Court's cursory ruling of res judicata muddies the applicability of a long line of authorities running back to Pennoyer v. Neff, 95 U.S.714, holding that no judgment can stand as res judicata unless it complies with due process.

The Supreme Court may elect to pass upon the points of law in the annexed petition in a vacuum. It may elect to pass upon the law and the facts together. The only other alternative is to return the case to the Fifth Circuit for an examination of the facts. At the same time, if necessary, the Fifth Circuit can be instructed to determine whether there exists any substantive principle of state law, apart from questions of evidence, that will support the State Court's judgment. We say there are none. If the Fifth Circuit disagrees and finds novel and important questions of law, it could invoke the abstention doctrine.

Numerous State Court decisions have been returned to the Court below for clarification. Minnesota v. National Tea Co., 309 U.S.551; State Tax Commission v. Van Cott, 306 U.S.511; Dep't of Mental Hygiene v. Kirchner, 380 U.S.194. There is no reason that a case should not be returned to the Federal Circuit for clarification whenever the same would assist the Supreme Court in its disposition of the case. The Supreme Court's jurisdiction over the Courts of Appeals "is of an extremely comprehensive nature." Stern & Gressman, Supreme Court Practice, 26.

WHEREFORE, premises considered, petitioners ask that consideration of the annexed petition for certiorari be deferred

and that this case be referred back to the United States Court of Appeals for the Fifth Circuit upon such conditions and with such instructions as the Court may deem proper.

RESPECTFULLY SUBMITTED,

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In the

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Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

Your Petitioners, Russell Harold Sitton and Barbara Sitton, respectfully petition for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in its cause No. 25,685 styled as above.[1]

---

1. Following is a complete listing of the respondents hereto: The United States of America, American Title Company, American Insurance Company, Trinity Universal Insurance Company, Lawyers' Surety Corporation, Katherine H. Brown, Jarvis Brown, Leonard C. Duckworth, Leonard C. Duckworth Agency, Harry Clifton Summer, Jr., and Mr. and Mrs. Walter J. Moorman.

OPINIONS BELOW

The opinion of the Fifth Circuit(A-11 to A-20 herein) is reported at 413 F.2d 1386 and the opinion of the Texas Court of Civil Appeals (A-50 to A-61) is reported at 396 S.W.2d 899. This Court has previously denied a petition for certiorari directed to the Texas Court. 385 U.S.975; 385 U.S.1033. Neither the U.S. District Court nor the Texas Supreme Court rendered an opinion.

JURISDICTION

This is an appeal from a summary judgment of the United States District Court for the Northern District of Texas rendered November 2, 1967(A-8 to A-10). Petitioners filed notice of appeal November 27,1967(A-10). The judgment (A-20)and opinion (A-11) of the Court of Appeals were both dated and entered July 30, 1969. Two extensions of time to petition for rehearing were granted (A-21), the last extension running through September 4, 1969. Petition for rehearing was filed on September 2, 1969 and overruled on October 22, 1969 (A-21).

Petitioners submit that they have been deprived of rights secured to them by the Fourteenth Amendment to the United States Constitution. In addition, the Texas Court held that petitioner, Sitton, is barred from recovery against third party respondents because of his supposed failure to apply to the Veterans' Administration for

hardship relief and the Court below held that he must pay six per cent (6%) interest on the within judgment even though V.A. regulations only call for four per cent(4%) on mortgage deficiencies. Both rulings call for construction of the Servicemen's Readjustment Act of 1944, as amended, and regulations pursuant thereto. Petitioners rely on 28 U.S.C., § 1254(1) to invoke the jurisdiction of this Court.

QUESTIONS PRESENTED

NOTE: How many questions should be presented in a writ application? We have been cautioned that to present too many questions is to invite the Court to disregard them all. However, we regard each of these questions as important and substantial and here present them to the Court knowing that the Court can and will restrict the writ only to the questions it decides should be heard.

One

Must a federal court adopt prior state court proceedings as res judicata even when the state judgment violates the guaranties of the Seventh and Fourteenth Amendments?

Two

Where the United States is a party to a case in the federal court and one of the parties invokes the previous judgment of a state court, is the federal court without jurisdiction to hear a claim that the state court proceedings violate the Seventh and Fourteenth Amendments?

Three

Does the Fourteenth Amendment require that the states observe the Second Clause of the Seventh Amendment providing that no fact tried by a jury shall be examined otherwise than according to the rules of the common law?

Four

Without weighing the credibility of the witnesses, is this a case where there is in the evidence, no room whatever for honest difference of opinion over the factual issue in controversy?

Five

Alternatively, was the action of the Texas courts in declaring that there is "no evidence" to support the jury's verdict so lacking in support that to give it effect would work that fundamental unfairness which is at war with due process and equal protection of the law?

Six

Did the Texas Court of Civil Appeals err in holding that a veteran who elected not to invoke the hardship provisions of 38 U.S.C. § 1820(a)(4) is barred from seeking relief from third parties for either:

(1) the amount of the mortgage foreclosure deficiency; or,

(2) any other damages resultant to the foreclosure of his G.I. loan?

Seven

When judgment is rendered against a veteran for a mortgage foreclosure deficiency, what rate of interest should apply, the rate

fixed by the Veterans' Administration or the rate fixed by the state law respecting judgments in general?

Eight

Can any part of petitioners claims be constitutionally held as barred by limitations?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED
(Text at A-63 to 65)

The United States Constitution, Article III, Section Two

The United States Constitution, Amendment Seven

The United States Constitution, Amendment Fourteen, Section 1

28 U.S.C., § 1254(1)

38 U.S.C., § 1803(c)(1)

38 U.S.C., § 1820(a)(4)

Texas Constitution, Article I, Section 15

Rule 290, Tex.Rules Civ.Proc.

Rule 291, Tex.Rules Civ.Proc.

STATEMENT OF THE CASE

FACT STATEMENT - FEDERAL COURT PROCEEDINGS

The Court of first instance in the present case was the United States District Court for the Northern District of Texas. The present suit was instituted by the government and federal jurisdiction is based on the presence of the United States as a party and the power of the federal courts to give complete relief after taking jurisdiction.

In the interest of brevity, the facts presented in the foregoing Motion to Defer Certiorari, etc. and the facts stated in the opinion of the Fifth Circuit will not be repeated. We wish to supplement the opinion in the following respects:

Our third party complaint should not be misconstrued. It was not simply a plea that the Federal Court "render such judgment against third party defendants as the State Court should have rendered" (A-17) We alleged our cause of action in full, pretty much the same fashion as it was alleged in the State Court. Petitioners alleged their damages and requested a jury trial upon the merits. Only as an alternative plea did petitioners ask to recover upon the State Court jury verdict. The State Court proceedings was first invoked not by petitioners but by third party respondents. They pleaded the State Court judgment as res judicata and further contended that petitioners were asking the Federal Court to "exercise appellate jurisdiction" over the State Court.

When third party respondents filed for summary judgment, petitioners answered in part as follows:

> "On November 20, 1964 third party plaintiffs' cause of action was tried in the state court. Mr. and Mrs. Sitton, the plaintiffs therein, were entitled to a jury trial under the applicable law and a jury was duly called. The jury, after being charged 'You are the sole judges of the facts proved' returned a verdict entirely in third party plaintiffs' favor. However, the state courts refused to enter judgment thereon, thereby denying due process of law and equal protection of law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments 7 and 14 of the United States Constitution."(R.250)

The entire record of the State Court proceedings was incorporated into petitioners' answer to motion for summary judgment by reference (R.252,254-255). The entire State Court record was filed as an exhibit (R.280) and has been brought up to this Court.

Your petitioners also moved for summary judgment(R.256-266) pleading that the jury verdict rendered in the State Court entitled petitioners as a matter of law to recover a judgment of indemnity for all amounts adjudged in the government's favor together with the actual and exemplary damages totaling $90,500 which the State jury had awarded to petitioners plus state and federal court costs and interest from January 21, 1965, the date of the state trial court's judgment. In short, petitioners asked to recover the amount of the verdict which was taken away

by the Texas Court without due process. Alternatively, petitioners renewed the plea of the complaint that they have a trial of the facts before a jury in the Federal Court. (R.72)

Even though the entire State Court record was before them, and even though these petitioners have extensively briefed to both courts the facts disclosed by that record, the U.S. District Court and the Fifth Circuit have each declined to consider the State Court proceedings. In effect, they have held that they must regard the State Court judgment as conclusive on its face alone.

FACT STATEMENT-STATE COURT PROCEEDINGS

The entire State Court record is presently before the United States Supreme Court and we request that it either be examined here or be referred back to the Fifth Circuit. Likewise, we shall not repeat matters contained in the opinion of the Texas Court of Civil Appeals except to clarify defects and inadequacies in that opinion. Assured by numerous citations that previous denial of certiorari is not decisive, we make no pretensions in that respect. The portions of this petition that are set in printer's type are reproduced directly from our previous petition.

The appendix contains numerous extracts of testimony and a copy of the forged deed (A-40). The evidence is further developed under the topic "What the Record Reflects."

Russell H. Sitton, a veteran of the Korean conflict, conveyed the home which he had purchased under the Servicemen's Readjustment Act of 1944 to Walter J. Moorman, plumbing contractor and real estate investor. He later brought action for conspiracy asserting that the real estate broker and title company who solicited his confidence and upon whom he relied, joined together with his grantee, misrepresented the transaction and committed forgery upon his deed.[2]

The key witness for the plaintiff was a loan service representative of the Veterans Administration, an unimpeached and unbiased witness who testified that both grantee Moorman and the vice-president of the title company admitted everything to him:

> "Q. * * * I believe, that it is your testimony that Mrs. Brown told you she had changed the deed? A. At Moorman's request, yes. * * * Moorman told me he had her do it and she told me she did it" (A-25).

For a full abstract of this testimony, refer to pages A-22 to 25. The Court's opinion ignores this testimony except to label one statement therein as "clearly hearsay" (A-55 & 56). Petitioners say the ruling is untenable. Even so, the Court's opinion further reflects the uncontrovertible facts that the alteration was made at grantee Moorman's request while the instrument was in the office of Mrs. Brown, the vice president and branch manager of the title company, and

[2] The notarial surety was dismissed before trial on the holding that for a notary to alter an instrument after executing his certificate and before the delivery thereof is not official misconduct. *Sitton v. American Ins. Co.*, 390 S.W. 2d 34 (Tex. Civ. App. 1965). Such holding has been described in Comments: The Notary Public, 16 Baylor L. Rev. 388, 395 as "an anachronism."

while it was under her dominion and control. The Court apparently took the position that petitioners have not sufficiently rebutted the possibility that it was all an innocent mistake.

Twenty-one (21) special issues (interrogatories) were submitted to the jury (A-41 to 45). It was charged that it was "the exclusive judges of the facts proved," the "credibility of the witnesses" and the weight of their testimony (A-41). It returned a verdict *entirely favorable* to the plaintiffs and awarded substantial actual and exemplary damages. Nevertheless, a judgment *non obstante veredicto* was rendered by the trial court and affirmed by the Court of Civil Appeals.

The Court's ruling in part was as follows:

> "Appellants * * * assert that the judgment *non obstante veredicto*, having been rendered * * * in the face of evidence of probative force * * * denied appellants due process and the equal protection of law guaranteed to them by * * * the Seventh and Fourteenth Amendments to the United States Constitution. The argument under these points does no more than * * * accuse the trial court generally of substituting its fact determination for that of the jury. Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation" (A-60).

We submit the diametric contrary. We cannot visualize a stronger case of conspiracy. If the proofs in this case failed to even present issues worthy of the jury's consideration, we cannot hypothetically state any proofs that could have carried the case to the jury.[3]

[3] The Court's only reference to respondent Summer was to point out that petitioners had testified "that they were assured" by Summer and his assistant "that Moorman would assume the debt" (A-53). Respondent Moorman was obviously unwilling to do so and the representations were, to say the least, incorrect. The rela-

It is to be emphasized that petitioners have three independent claims for damages and they have been denied them all and have been adjudged responsible for court costs aggregating $1339.80 as well. (R. 263-266) Petitioners have been denied of:

(1) Actual damages for "the amount of the deficiency due under the note in question after the foreclosure" (A-59).

(2) Actual damages for mental anguish and physical suffering.

(3) Exemplary damages appurtenant to either or both claims for actual damages.

There is considerable divergence of opinion regarding the circumstances under which damages for mental suffering will be allowed, but they are allowable to some extent in almost every jurisdiction. The Court's opinion concedes that in Texas the right to recover such damages is "well settled" (A-57). The matter is of no concern at this point because (1) there are other damages in the case and (2) the court chose to lay the case on a supposed lack of evidence. In refusing to allow recovery of the mortgage deficiency, the Court said:

> "Appellants complain * * * of the failure of the trial court to render judgment for the foreclosure deficiency, the amount thereof being uncontroverted. Appellants having relied exclusively on the theory of conspiracy to establish any liability against appellees,

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tionship between the parties strongly indicates that the real estate broker was not misled by his customer. There is considerably more evidence in the record concerning respondent Summer which we developed in our amended brief, pp. 21-25, 34-38 and in our motion for rehearing, pp. 5-7, 20-22 before the Court of Civil Appeals. Both these documents have been filed in this Court

We will not go into further detail here because a conspiracy is composed of "two or more persons" (Brown and Moorman) and the substantial body of circumstantial evidence concerning Summer is not material to the granting of this petition.

and this court having held that there was no evidence of a conspiracy to alter the deed in question, or of alteration of the deed as a result of conspiracy, it follows that there was no reversible error [in denying recovery]." (A-59 & 60)

It is to be further emphasized that petitioners have been totally deprived of their day in court. The circumstances under which new trials may be granted or remittiturs ordered on pain of new trial are not in the case because no such action was taken.

REASONS FOR ALLOWING THE WRIT

FEDERAL LAW CONTROLS FEDERAL OBLIGATIONS

We present the rate of interest question first because it is concise and because we wish to demonstrate that it is an important point of first impression. We have no exact statistics at hand, but surely millions of loans have been made under the G.I. Loan Guaranty Program. The Assistant U.S. Attorney stated to counsel during the trial court proceedings that in his files alone, there were several hundred G.I. mortgage deficiency cases. Multiply this by the number of federal district courts in the land and it is immediately apparent that millions of dollars are involved. Much of this money must come from those who can ill afford to pay. Every penny of additional interest will be taken from those who have honorably served their country on the field of battle.

The government's own pleadings (to which it is bound) state that interest "continues to accrue" at 4% "pursuant to V.A. Manual MP-4, Part V, DVB supplement, Par. 2G.05(9/30/57)" (R.61). By 38 U.S.C. § 1803(c)(1), the

Administrator of Veteran's Affairs is ordered to fix interest rates and the rate fixed is 4%, 38 C.F.R., §36.4017. Nevertheless, the judgment calls for interest "from this date at 6%(R.63)."

At the outset of its opinion while discussing the liability of Mrs. Sitton, the Court clearly acknowledged the general principle that federal law ordinarily governs federal obligations. It stated that only when there are overriding considerations of policy will a contrary rule be applied. Such considerations were found present in United States v. Yazell, 382 U.S.341: "Each state has its complex of family and family-property arrangements. * * * We have no federal law relating to the protection of separate property of married women. We should not here invent one."

Yazell is the exception. United States v. Shimer. 367 U.S.374; McKnight v. United States, 259 F.2d 540(9th 1958); and United States v. Wells, 403 F.2d(5th 1968), establish the rule. A veteran's obligation is a federal obligation governed by federal law. The Court cited these authorities at the outset of its opinion, but disregarded them on the rate of interest and declared, without supporting authority, that a "clearer expression" of Congressional intent would be required in order to apply federal law. We say there is a presumption that federal law applies.

While there are no cases specifically concerning interest on G.I. loans, it is well established that, in general, interest on federal obligations is a matter of federal law. The leading case is Royal Ind.Co. v. United States, 313 U.S.289:

> .the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due.

The Royal case was cited as controlling in Continental Oil v. United States, 184 F.2d 802(9th 1950), and in United States v. Seaboard Surety Co., 339 F.2d 1(2d 1964). Royal obviously sets up two classifications, first where there is an applicable federal statute and, second, where there is none; but federal law controls in each instance.

We say that Mr. Sitton's obligation falls in the first classification. Congress has ordered the Administrator of Veteran's Affairs to establish a rate and the 4% rate established by the regulations has the force of a United States Statute.

Even if the regulation is not to be considered the equivalent of a statute, the 4% rate should still apply. In Royal, this Court held that "a fair rate is * * * appropriate" and under the circumstances of that case the "rate prevailing in the state" was found to be fair. Justice Black dissented that the rate was too high, that a smaller rate would be "fair and equitable", and urged that any rate established should be "national in its scope," which is the precise holding in Shimer, Wells and McKnight. Obviously, the only method of establishing a rate "national in its scope" would be to adopt the 4% rate set by the Veteran's Administrator.

We present that the Court below failed to recognize that the Servicemen's Readjustment Act and regulations thereunder are not part of a money-making scheme. To the contrary, they are designed to confer a special benefit on a special class; namely, veterans. Obviously, the Administrator set a 4% rate because he considered that it would be "fair and equitable" to the Treasury. A glance at the financial pages of any newspaper will show that even today, the Treasury has outstanding billions in bonds that pay 4% or less.

In deciding that 4% was compensatory, the Administrator was exercising his Congressional authority. His finding, unless challenged as arbitrary and discriminatory, is conclusive. Why in this world would a 4% rate be "fair and equitable" to the Treasury before judgment, but not after judgment? Mr. Sitton earned his G.I. benefits in the service of his country. From what part of the law or regulations can one infer an intent to abandon the beneficiaries of this special legislation at the courthouse door?

Regarding the "congressional intent to benefit veterans," may we emphasize that the regulation of interest rates chargeable to veterans is a vital part of the entire G.I. loan program. Every piece of veterans' loan legislation has either expressly set interest rates or has mandatorily enjoined the Administrator of Veteran's Affairs to do so.

Bear in mind that, through its usury laws, every state regulates the rate of interest chargeable to its residents <u>before</u> judgment as well as <u>after</u> judgment. Beyond doubt, Congress was dissatisfied to leave

the regulation of interest rates before judgment to state law. To us, it is inconceivable that Congress intended to relegate the matter to the vagaries of state law after judgment.

The statute fixing interest on Federal Court judgments at the state rate is salutary in general because the rate of interest should not be governed by the choice of forum. But, the government has never previously been held subject to 28 U.S.C. §1961. The Court has failed to recognize two universally acknowledged rules of statutory construction: First, the particular controls over the general. V.A. laws and regulations should be applied here because they are specifically designed to cover veterans' obligations to the United States Treasury. Second, laws of general application do not apply to the sovereign unless expressly provided to the contrary.

Essential matters, such as the rate of interest to be charged, should not be left to the vagaries of state law. In Wells, it was declared "the application of federal law is particularly needed to insure the uniform administration of the nationwide Veteran's Administration program." How can one infer an intent on the part of Congress or the Administrator to require a veteran in one state to pay a different rate of interest than a veteran in another state.

The way that interest rates are snowballing, V.A. regulations may soon call for 7% or 8% on mortgage deficiencies.

Will this Court still hold that a 6% state rate applies? We earnestly submit that had the rates been reversed, the state law calling for 4% and the V.A. regulations calling for 6%, the Court would have unquestionably applied the federal law. The opinion calls for state law to apply unless there is a "clear expression" to the contrary. This is the first decision that we can find invoking a presumption that state law should govern over federal law. Obviously, the government has argued for the application of state law because it deprives Mr. Sitton of the benefits of the V.A. regulations. The Court should not have allowed a deserving veteran to be whipsawed in this manner.

WHEREVER THE UNITED STATES IS A PARTY, THE FEDERAL COURT HAS JURISDICTION TO GIVE COMPLETE RELIEF

We feel that this Court will first wish to know the errors that were committed by the United States Court of Appeals for the Fifth Circuit. For this reason, we are briefing the case in inverse order, from the last event to the first. We shall conclude by showing that the State Court denied petitioners' constitutional rights by overturning a valid jury verdict. Immediately below we present that the State Court judgment cannot stand as res judicata. Although they are closely interrelated, the law of res judicata and the law of federal jurisdiction are completely separate. The Court failed to make this

distinction. Even if the decision of the State Court were res judicata many times over, the facts are that this case reeks with federal jurisdiction. "The Judicial Power shall extend * * * to Controversies to which the United States shall be a party." U.S. Const., Art. III, Sec. 2. It can hardly be better settled than that once having acquired jurisdiction of a cause of action, the federal courts have jurisdiction to give complete relief. The Court misconstrued Rooker v. Fidelity Trust Co., 263 U.S. 413. The other cases in the Court's opinion are all lower court cases following Rooker. The cases are completely distinguishable from the case in bar.

(1) In Rooker, the plaintiff relied upon the allegedly unconstitutional action of the state court as creating federal jurisdiction.

(2) Petitioners rely on the presence of the United States as a party to invoke federal jurisdiction.

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J. in Hyde v. U.S., 225 U.S. 347, 384.

The proposition that "federal courts have no authority to act as an appellate arm of the state courts" is a beautiful generality. On the one hand, it is so obviously correct that it forbids elaboration. On the other hand, it is so abstract that it proves little or nothing. The channels for appellate review are clearly spelled out. The federal courts have neither the desire nor the power to take over the functions of the state appelate courts any more than they have the

desire or the power to take over the functions of local school boards, police forces, commissioners' courts and legislatures. The federal courts not only have the power, but they have the duty to require that all of these local government units observe the mandates of due process.

It has never been suggested that in deciding the Rooker case, this Court intended to abandon or overrule that venerable authority, Pennoyer v. Neff, 95 U.S.714. In Pennoyer, there was a state court judgment against Neff and his land was sold by the sheriff to satisfy that judgment. Neff then brought a federal court suit to recover his land. He obtained federal jurisdiction on the grounds of diversity. Just as the third party defendants at bar invoked the state court judgment as their defense in the federal court, the defendant there invoked the state judgment as his defense. Did the federal court dismiss on the grounds that "a federal district court has no original jurisdiction to reverse or modify the judgment of a state court" as declared herein? Obviously not. The federal courts there proceeded to examine the state court record and hold the proceedings to be wanting in due process.

Is there a distinction between Pennoyer and Rooker? We say, "Yes". In Pennoyer, the federal court had jurisdiction on the grounds of diversity, while in Rooker it was contended that the allegedly unconstitutional procedures created federal jurisdiction. Admittedly, the language of Rooker is quite broad, but the Court is certainly familiar with the following elementary principle of judicial construction:

> "The Palmyra, like every other case, must be read in the light of the point to be

decided in the case." Wetmore v. Karrick, 205 U.S.141,155.

We have examined all of the authorities cited by the Court and by third party appellees and have gone some distance on our own. We believe this to be the first case on record dismissing for want of federal jurisdiction in a case where the United States is a party. The Fifth Circuit did not grasp the distinction between cases where the parties rely on the deprivation of a constitutional right by a state court as creating jurisdiction, and those cases where jurisdiction exists on independent grounds. We say this because the Court in its opinion has lumped both kinds of authority together. In Hanna , Williamson, Manufacturers, Jones, Pilkinton, Wood and Warriner,[3a] there was no jurisdiction under the Rooker test. We agree that those cases should have been dismissed.

The Court cited only one case where there were independent grounds of federal jurisdiction as in the case at bar. Resolute Ins.Co. v. North Carolina, 397 F.2d 586(4th,1968) It appears that there was diversity jurisdiction in that case. We submit that such case falls into that rather substantial category where the result was entirely correct even though some of the language was clearly inappropriate.

Of the foregoing cases cited in the opinion below, only Resolute is anywhere near in point. Please notice that in Resolute

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3a. Hanna v. Home Ins.Co.,281 F.2d 298 (5th,1960); Williamson v. Puerifoy,316 F.2d 774 (5th,1963); Manufacturers Record Publ.Co.v. Lauer,268 F.2d 187(5th,1959); Jones v. Hulse, 391 F.2d 198(8th,1968); Pilkinton v.Pilkinton, 389 F.2d 32(8th,1968); Wood v. Conneaut Lake Park,Inc.386 F.2d 121(3rd,1967); Warriner v. Fink,307 F.2d 933(5th,1962).

the claim was also barred by the Federal Anti-Injunction Statute, 28 U.S.C., § 2283. Take note of the fact that the Fourth Circuit found that no constitutional right had been denied as a matter of fact, a ruling that the Court below would not entertain. Please also notice that the Court did not hold that there was a lack of federal jurisdiction, but dismissed for failure to present a "justiciable controversy." We do not seek to draw any fine nuances of distinction, we simply point out that in Resolute, the Court declined to flatly declare the case without federal jurisdiction as has been done here.

We heartily agree that the lower federal courts have no appellate jurisdiction over state courts. Nevertheless, they have ample jurisdiction to examine the nature and effect of state court judgments. Particularly, ever since Pennoyer v. Neff, the federal district courts when clothed with jurisdiction on independent grounds, have had the authority to examine state courts' judgments for compliance with due process. There are many cases. Knowingly or unknowingly, the Court below extended our listing with its footnote citation of Atchison, T. & S. F. Ry. v. Wells, 265 U.S. 101. In that case, the plaintiff, through garnishment, obtained a Texas judgment against a non-resident. The defendant later brought suit in the federal court to enjoin the enforcement of the judgment. Did the Court there hold that federal courts have "no authority to act as an appellate arm of the state courts?" To the contrary, the judgment was held void as an undue burden on interstate commerce. We might further point out that the garnishee which was clearly the subsidiary, alter ego and other self of the defendant had already raised and had already been overruled on the identical point

in the state court and no appeal was taken.

The Court might have felt Wood v. Conneaut Lake Park, Inc., to be close in point because it involved a judgment n.o.v. The resemblance is superficial. The Court there plainly stated that it was without diversity or other conventional grounds of federal jurisdiction. The appellant there did not invoke the Seventh Amendment, but grounded his constitutional claim on an assertion that the state court rulings were arbitrary and discriminatory. However, the federal court held that any errors that were manifested fell within the mere error rule. The case gives support to petitioners because it was clearly indicated at Point 3 that if the state court was guilty of unconstitutionally arbitrary action, the federal court would give relief. Petitioners have so contended throughout. Also, in the Court's citation of Jones v. Hulse, please note that the Eighth Circuit there stated that federal courts might give relief "under appropriate circumstances."(p.202)

May we again point out that the Court has quoted our plea "that this Court render such judgment against third party defendants as the State Court should have rendered" but it has wholly failed to recognize the very next line where petitioners pleaded "alternatively, that a plenary trial on the merits be held"(R.72). As we see it, the motions to dismiss cannot reach petitioners plea for a plenary trial of the facts stated in the complaint. Contrary to Rooker, we do not need to allege or prove the irregularity of state proceedings to invoke jurisdiction. If the present case is tried before the Federal Court without considering or dis-

cussing or referring to any state court proceedings, how can it be contended that such a trial constitutes "appellate review" of state court proceedings? While their argument is not entirely clear to us, it is our understanding that respondents concede (R.43-45) that their motions to dismiss run only to your petitioners' plea to enforce the State Court jury verdict, the same as a judgment from another state or district court might be enforced through suit in the Federal Court(R.71,260) which plea is the basis of petitioners' motion for summary judgment, only one of the alternative pleas submitted.

Griffin v. Griffin, 327 U.S.220, was an action to recover on a state court judgment. Rather than hold "Federal Courts have no jurisdiction over state courts," the Supreme Court held that no other jurisdiction shall give effect to a judgment elsewhere acquired without due process. And yet, the case in bar has been dismissed on the strength of prior state proceedings even though other grounds of jurisdiction are present. Even though the Court below was numerously requested to do so by original brief and again by petition for rehearing, it steadfastly declined to examine the State Court record for failure to comply with due process. In effect, the Court held that it would recognize and enforce the State Court judgment whether or not it complied with due process.

Likewise, the cases of England v. Louisiana State Board of Medical Examiners, 375 U.S.411, Tribune Review Pub.Co.v.Thomas, 254 F.2d 883(3rd,1958) and Olson v. Board of Education, 250 F.Supp.1000(EDNY,1966)were each cases where there had been prior state

court proceedings. As in the case at bar, there were independent grounds of federal jurisdiction in each. None of them was dismissed on any holding of "no appellate review;" the jurisdictional grounds in each instance being a federal question unrelated to the state court proceedings. Additionally, may we point out that jurisdiction of federal district courts to review state court criminal proceedings for compliance with due process is beyond dispute. Sheppard v. Maxwell, 384 U.S.333; Irvin v. Dowd, 359 U.S.394.

And, may we particularly mention O'Boyle v. Bevil, 259 F.2d 506(5th,1958), a situation virtually on all fours with Pennoyer, where the Court found that it had diversity jurisdiction and proceeded to examine a state court judgment for compliance with due process.

Summary: If the courts of Texas have deprived the Sittons of any constitutional rights, then the federal courts have deprived petitioners of those identical self-same constitutional rights because the federal courts have bottomed their ruling solely upon the outcome of state court proceedings, blindly and unswervingly following the state judgment and steadfastly refusing to consider any claim of constitutional defect therein. Whatever rights were denied to Russell and Barbara Sitton in the State Court have now been denied to them in the Federal Court.

Supreme Court Rule 19 indicates that a "special and important" reason for the grant of certiorari exists "where a court of appeals has rendered a decision in conflict * * * with applicable decisions of this Court." The within decision holding that even though the United States is a party, there is no federal jurisdiction to

examine state court proceedings for compliance with due process cannot be reconciled with Pennoyer v. Neff or Griffin v. Griffin. The case constitutes a questionable and unwarranted extension of Rooker v. Fidelity Trust Co. far beyond its original terms.

May we also point out that the Rooker decision is almost fifty years old and the Supreme Court has not visited it since. We challenge the Court to look beyond the "encysted phrase" of "no appellate review". The Fourteenth Amendment applies to each and every state agency, courts included; it is a limitation upon the exertion of every power and authority possessed by state officials. Why should the local federal courts possess jurisdiction to prevent deprival of due process by state courts in criminal cases but not in civil cases even when these local federal courts have ample jurisdiction to control the deprival of due process by every other state official? If Rooker is properly analysed, it is immediately apparent that the case is not a decision regarding jurisdiction at all. The case is a declaration of policy. We submit that under the Constitution, the federal courts in each locality were, are and always have been clothed with the naked power to prevent state courts from denying due process. In Rooker, a restriction was placed upon the authority of the local federal courts to exercise their jurisdiction.

The mode of life has obviously changed since 1923 and the federal judicial system has changed apace. In 1923, the Supreme Court felt that appellate review through the state courts up to the Supreme Court of the United States was ample means for the review

of state court decisions in civil cases. Thus, the declaration of policy in Rooker. Since Rooker, there is still only one Supreme Court but not only the population and the number of courts, but the entire due process concept has burgeoned tremendously.

Is the declaration of policy contained in Rooker v. Fidelity Trust Co. still applicable in this year 1970? We do not know. We regard the edifice as archaic but we only seek to prevent its extension, not to dismantle it. We do know that Rooker has never been applied and was never intended to apply as an overruler of the Pennoyer case, or any other case where there are independent grounds for federal jurisdiction. We strongly question whether Rooker is in harmony with present day constitutional policy. Certainly its extension to cases where the United States is a party is an unwarranted and unwholesome restriction upon due process of law and should be reversed.

RES JUDICATA IS NOT THE SUPREME LAW OF THE LAND

While the opinion contains a whole buckshot load of citations on the jurisdiction question, it contains no case law on the res judicata question, which to our minds is the real nitty-gritty of the case. It is no reflection on Moore's Federal Practice to say that text books are a fine point of departure but they are rarely specific enough to decide a disputed question of law. We have examined Section 0.405(3) cited by the Court and find nothing in the caption or text thereunder very close to the question in hand. To illustrate our point that citations of texts prove

little or nothing, may we draw the Court's attention to Section 0.405(12) entitled "Danger of Inflexibility:When the Equity of the Rule Should be Applied" or even more particularly, Section 0.406(2) entitled "Relation to Due Process, Separation of Powers and Other Constitutional Doctrines." Most of the cases relied upon in the following argument are cited in those later sections. We submit them as controlling.

Again, we are arguing the case in inverse order. Please assume for the time being that the State Court did what we say it did--violated the rights of petitioners under the Seventh and Fourteenth Amendments by throwing out a valid jury verdict upon the pretext that there was no evidence to support it. The Federal Courts have now denied petitioners of those selfsame rights by treating the State Court judgment as conclusive on its face. We now reach the following proposition:

(1)This Honorable Court cannot apply both the Seventh Amendment and the rule of res judicata. It must choose between the two. Which is of the higher order?

(2)In making its choice, the Supreme Court must bear in mind that jury trial and the clause against re-examination of jury verdicts is a principle of constitutional law while res judicata is founded on nothing more than judicial policy.

(3)As we submit below, the rule of res judicata is neither monolithic nor inflexible nor unyielding. The courts have numerously refused to apply res judicata when to do so would (a) defeat federal policy or (b) produce an unjust result.

Res judicata is judicial law, not constitutional law. It is founded upon the principle that litigation should come to an end after the parties have had a reasonable opportunity to assert their claims. Petitioners have not been provided with a reasonable opportunity to assert their claims because the state court refused to recognize a valid jury verdict. Decisional law, i.e. res judicata, must give way when it stands in the path of constitutional law, i.e. due process.

The full faith and credit clause of the Constitution requires that the judgments of one state be honored in another state, but such clause is not directly applicable to the federal courts. The federal courts are required to observe state court decisions under Erie v. Tompkins and and under the Rules of Decision Act, 28 U.S.C. § 1652 providing:

> "The laws of the several states, except where the Constitution * * * otherwise requires(s), or provide(s) shall be regarded as rules of decision in civil actions in the courts of the United States."(our emphasis)

Clearly, the permissible limits of res judicata between the state and federal courts is written into the face of the Rules of Decision Act. It is an elementary principle of constitutional law that the state and federal courts are dually autonomous. While state court pronouncements of state law are paramount, the federal courts are the final arbiter of the United States Constitution.

Beyond question, the federal courts

are not required to accept state court rulings as final and conclusive when they concern questions of constitutional law. In numerous habeas corpus proceedings, the petitioner has prevailed in the federal court on a due process claim which had been expressly presented and rejected in the state court and the decision had become final. Within limitations, the same rule is applicable to civil actions. It has been numerously held that judgments obtained in violation of due process are not entitled to recognition as res judicata.

> "A judgment obtained in violation of due process is not entitled to full faith and credit when sued upon in another jurisdiction. * * * Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process." (our emphasis) Griffin v. Griffin, 327 U.S. 220.

As was stated in Hansbury v. Lee, 311 U.S. 32:

> "When the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigants whose rights have thus been adjudicated have been afforded * * * the due process which the Constitution prescribes."

Other cases to the same effect are Postal Telegraph Cable Co. v. Newport, 247 U.S. 464; Hovey v. Elliott, 167 U.S. 409;

Wetmore v. Karrick, 205 U.S.241 and Old Wayne Life Ass'n.v.McDonough, 204 U.S.8.

We particularly direct the court's attention to the case of Bass v. Hoagland, 172 F.2d 205(5th,1949),cert.den.338 U.S.816, 94 L.Ed.494,70 S.Ct.57(1949). A Texas resident was involved in an automobile collision in Kansas and suit was brought against him in the U.S. District Court in Kansas. After filing an answer, the defendant's attorney withdrew and the plaintiff proceeded to take a judgment in the defendant's absence. When suit was brought on the judgment in the U.S. District in Texas, the court refused enforcement (i.e. refused to recognize it as res judicata) and its ruling was upheld:

> "The last defense is more lengthy, and alleges that the judgment is void as taking property without due process of law contrary to the Fifth Amendment * * *; because rendered without a trial by jury after a jury had been duly demanded by plaintiff and defendant had not consented to a withdrawal of the demand under Rule 38(d)."
>
> * * * * * * * * *
>
> "The last defense requires careful consideration. It asserts that the jury trial of the fact issues in the case which is guaranteed by the Seventh Amendment of the Constitution, * * * was denied though demanded; and that default was recited in the judgment as its basis when there was no default, but an answer to the merits; and that if there was default the notice required by Rule of Civil Procedure 55(b)(2) before

proceeding to judgment by default was not given by plaintiff, nor the jury trial had as to the amount of such unliquidated damages as required by the same Rule; and no evidence at all was heard; and that it all amounts to a denial of due process of law under the Fifth Amendment. We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. * * * The right of jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly an unconstitutional abuse of power. * * * Rule of Civil Procecure 38 requires that the right be asserted by a demand for it. We have found no federal case which has treated as a mere procedural error a flat denial of a jury trial demanded in a civil case, though we have found none holding its denial to be by itself a good ground of collateral attack.

"* * * There was appearance and pleading as the summons required, and a demand for jury trial by the plaintiff which operated as a demand by the defendant also unless withdrawn by his consent, which was not given. Rule 38 (a,b,d). The judgment nevertheless recites that there was a default

> because counsel for defendant at some previous date withdrew as such. There was no withdrawal of the defendant's appearance and pleading and demand for a jury. * * * This does not look like due process of law under the Constitution, nor even like a judicial trial."

An identical ruling was made in the companion case of Bass v. Bailey (5th,1949) 172 F.2d 212,cert.den.338 U.S.816,94 L.Ed.94, 70 S.Ct.56(1949).

Just as one federal court is required to re-examine the judgment of another federal court to determine if the judgment complies with due process, it is also required to examine the judgment of a state court when called in question during a subsequent federal court proceedings. The leading case of O'Boyle v. Bevil, 259 F.2d 506(5th,1958) also arose in Texas. Two judgments for title to land were obtained by publication in the state court. The state court defendants thereafter filed suit in the United States District Court to vacate the state judgments. The U.S. District Court held the recitals in the state judgments to be conclusive and that the federal courts were bound by them. The holding was reversed on appeal:

> "But for the rule of absolute varity we have found that the record in these two cases discloses that appellants are denied due process if the judgments are allowed to stand in spite of the procedural defects. Is it any less a denial of due process to hold that a court may by its own fiat declare that requirements were met which the record discloses were not in fact met? We think not."

In the case at bar, the State Court held:

> "Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation."(396 S.W.2d 905)

The State Court has declared that it can find no evidence to support "any part of the verdict" and that "the trial court gave appellants every reasonable opportunity to make out a case * * * they failed to do so." Petitioners present that a declaration that the Court can find no violation of constitutional rights does not "render white that which is black nor straight that which is crooked." In line with the O'Boyle case, we submit "that the constitutional requirements of due process require a holding * * * that no such principles of lifting oneself by his own bootstraps can prevent (a federal court) * * * from inquiring into any facts disclosed by the record."(our insertion. In line with Griffin, Hansbury and O'Boyle, we ask that this Court examine the record. In line with Bass, if the record reflects that meaningful jury trial, that is, jury trial in substance as well as in form, was "denied after demand, the judge usurping the function of the jury," then the judgment of the state court is "without jurisdiction and void, and attackable collaterally before this Court in the instant proceedings.

CONSTITUTIONAL QUESTIONS MAY BECOME RES JUDICATA UPON THE BASIS OF ELECTION OR FAILURE TO ASSERT: NEITHER APPLIES TO THIS CASE.

We do not dispute the propositions that where a litigant has chosen the state court as the forum in which he desires to litigate his constitutional question, he may not thereafter assert it in the federal court if dissatisfied with the outcome. Such proposition is not here applicable because there has been no election of forum. In England v. La.State Bd.of Medical Examiners, 375 U.S.411, a group of chiropractors filed a federal court suit attacking the constitutionality of a medical practice act. The federal court invoked the abstention doctrine requiring the plaintiffs to file suit in the state court where it was held that the statute violated neither the state nor the federal constitutions. The Supreme Court held that the state court decision would not be res judicata to the reinstitution of federal court litigation because the plaintiffs had reason to apprehend that they were compelled to present their federal claims to the state courts. In short, there was no election.

Likewise, there has been no election on the part of petitioners, Mr. and Mrs. Sitton, to present federal questions to the state court. At the time they filed their suit, it was simply a tort action between residents of the same state covered entirely by state law. The federal questions arose from the conduct of the trial itself. Under such circumstances, for the federal court to throw up its hands and declare that it has no power to review state court interpretations of the Constitution

would be the abandonment by this Court of its paramount power in the field of federal law.

Now, to a considerable extent, failure to assert is the converse of election. When the federal question arose in the State Court, petitioners were forced to assert it or run the risk of losing it forever on the grounds of failure to assert. The doctrine is well established that constitutional questions must be timely asserted or they will be waived. Not only does this promote respect for the Constitution but it holds out greater promise that the state courts will, in fact, observe due process and provide the relief demanded by the Constitution.

The case of Wagner Electric Co. v. Lyndon, 262 U.S.226 was decided in 1923 and the view of the Seventh Amendment there expressed can hardly be cited as contemporary. Even so, we believe the decision can be justified on the basis of failure to assert. There is no indication that the Seventh Amendment was timely asserted in the state court proceedings. Lyndon v. Wagner Electric Co., 285 Mo.77,225 S.W.711(1920). Failure to assert is also apparent in Rooker v. Fidelity Trust Co., 263 U.S.413 cited by the Court below regarding federal jurisdiction. The case had been previously brought to the Supreme Court, Rooker v. Fidelity Trust Co., 261 U.S.114, where it was held that a federal question not raised in the state court until petition for rehearing is not timely asserted. It would have been entirely inconsistent to hold that the complaint not timely asserted in the state court later be asserted in the federal district court.

We believe that the cases clearly indicate that a due process plea is not

subject to the ordinary rules of res judicata. Absent a failure to assert or an election, a due process claim remains open even though adversely decided in the state courts. It does not constitute "appellate review" for a local federal court to examine a prior proceedings for lack of due process. In addition to the foregoing, there are numerous other cases in point.

In Tribune Review Pub.Co.v.Thomas, 153 F.S.486(W.D.Penna,1957)affd.254 F.2d 883(3rd, 1958), it was held that the plaintiffs could raise their due process points in the federal court even though they had been decided adversely in the state court. In Olson v. Board of Education, 250 F.S.1000(E.D.N.Y., 1966) the plaintiffs elected to place their federal question before the state court but the court chose to rule on state grounds. It was held that the bar of res judicata could not be applied because the state court had not "directly reached the federal constitutional question." In the Texas courts, petitioners' constitutional claims were avoided rather than decided on a pretense that the record discloses "no such evidence and no such violation." The Constitution requires the federal court to determine if, in fact, there was any such evidence or any such violation before applying the rule of res judicata.

THE HIGHER POLICY MUST PREVAIL

Again, res judicata is no more than a declaration of judicial policy. It has numerously been forced to give way to a more commanding policy. In Kalb v. Feurstein, 308 U.S.433, the Supreme Court held that a state court judgment rendered in violation of the bankruptcy act cannot be res judicata.

"The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." In Denver Bldg. & Const.Trades Council v. N.L.R.B., 186 F.2d 326(Dist.Col,1950)rvsd.oth.gnds.,341 U.S.675, it was held that res judicata could not be applied where it was inconsistent with the statutory scheme of regulation. In Spilker v. Hankin, 188 F.2d 35(Dist.Col,1951) it was held that res judicata would not be applied because of the public policy in giving careful scrutiny to all transactions between attorney and client. In short, the higher policy prevails.

May we point out again that the State Court did not pass on movants' due process points. It pretended that they do not exist. In Wilkins v. Wilkins,(C.A.1896)L.R.P.108 res judicata kept a man, who had been adjudged dead, legally dead, although his death was much exaggerated by the judgment and he was in fact alive. Fortunately, the Court of Appeal had the power to, and did extend the time to move for a new trial thus enabling the court to deal with the facts as they actually were. The precise question here is whether the State Court may prevent consideration of movants' due process points by pretending they do not exist. Res judicata is founded on judicial policy. Due process is founded on constitutional policy. Where the two are in conflict, it can hardly be more apparent that the Constitution must prevail.

RECAPITULATION

A short review of our argument is in order:

(1) The Texas Courts failed and refused

to apply the Seventh Amendment standards forbidding the re-examination of jury verdicts other than according to the rules of the common law and thereby deprived petitioners of due process and equal protection of law.

(2) A judgment obtained in violation of the Fourteenth Amendment may not be enforced in another court.

(3) The federal courts are the final arbiters of due process.

(4) Recitals in a judgment or opinion that there is no evidence to support a verdict are not conclusive. When these recitals are challenged, due process requires that the federal court make its own determination. This, both of the courts below failed and refused to do.

(5) When a party has an election between the state and federal court in which to litigate a federal question, he is bound in res judicata by the election. However, such an election was never available to Mr. and Mrs. Sitton..

(6) Federal policy requires that when a due process question arises in the course of a state court proceedings, a party must present and argue his objections at that time. If he holds it in abeyance for federal court review at a later date, it will be held to have been waived for failure to timely assert and the rule of res judicata will be applied. Petitioners satisfied the rule by timely asserting the federal question before the State Court.

(7) Res judicata is a doctrine of judicial policy and must yield to the "supreme law of the land."

(8) We are unable to find where a state court ruling on a due process question has ever been held to be res judicata unless there has been (a) an election or (b) failure to timely assert. There was neither election nor failure to assert in this case.

(9) The essential holding of Rooker v. Fidelity Trust Co. is that federal jurisdiction is not created by the denial of a constitutional right during the course of state court proceedings. Where federal jurisdiction is invoked on other grounds, the United States Supreme Court has repeatedly held that a lower federal court not only may but must examine the state court record and determine the constitutional issue for itself.

(10) Nor, we submit on a long series of cases from Pennoyer to O'Boyle does it constitute "appellate review" to examine a state court proceeding to determine if due process has been complied with.

DENIAL OF CERTIORARI IS NOT DECISIVE

Ever since their first appearance in the federal court, respondents have spent most of their time arguing that this is a case where the United States Supreme Court "has already denied certiorari." Whether or not they employ the term "res judicata," they contend that denial of certiorari is conclusive. While the opinion of the Fifth Circuit contains no such ruling, the Court did take pains to emphasize that certiorari has been denied. This Honorable Court has repeatedly held that the denial of certiorari is not decisive.

We adopt the opinion in Tribune Review Pub.Co.v.Thomas,153 F.S.486(W.D.Pa.1957) as

our brief and the authorities cited therein as our authorities on the certiorari point. See also U.S.v.Carver, 260 U.S.483,490; Davis v. Balkom,369 U.S.811;Sheppard v.Maxwell,384 U.S.333.

LIMITATIONS IS NOT A BAR

The Courts below did not pass upon respondents' plea of limitations. We urged in the Fifth Circuit that these pleas are not valid under State law (Apts'Br.58-59). The Court's failure to pass upon this point is further reason to grant our motion to refer the case back to the Fifth Circuit.

Nor is the plea of limitations good under federal law. The state courts have been closed to plaintiffs and the federal court had no jurisdiction until the United States became a party. The due process clauses of the Fifth and Fourteenth Amendments precludes limitations from running while the courts are closed or physically unavailable and there is no forum in which the case may be litigated. Hanger v. Abbott, 73 U.S.542;The Protector,76 U.S.687;Ross v. Jones, 89 U.S.576;Osborne v.U.S.,164 F.2d 767(2nd,1956);First Nat'l Bank v.Anglo-Oesterreichische Bank,37 F.2d 564(3rd,1930); Borovitz v. American Hard Rubber Co.,287 F.368(N.D.Ohio,1923).

The Supreme Court has Never Ruled on the Application of the Second Clause of the Seventh Amendment to the States

The Seventh Amendment contains two distinct clauses:

> (1) "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and;"
>
> (2) "No fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Mr. Justice Story declared the two clauses severable in *Parsons v. Bedford*, 28 U.S. 433, 447-448:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. * * * This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner [than by the] modes known to the common law. * * *"

Petitioners say that Clause Two is the "more important" because it insures that jury trial will be reality rather than promise. The people may feel secure having provided by Constitution and statute for jury trial but, to be effective, the provision must be implemented. For a judge to refuse

to call a jury where the law so provides would be an intolerable act of open defiance but for the same judge to override the jury's decision on the pretense of "no evidence" would be equally subversive of the law and far more insidious because the public is being deluded.

Numerous cases construing the *first clause* of the Seventh Amendment have held that it is not applicable to the states. Most of them are old. However, diligent and exhaustive research fails to turn up a single case where this court has directly and necessarily decided if clause two is applicable to the states. Any argument that the first is decisive of the second has been shown unacceptable. The entire question has been dormant for nearly forty years. It should be reexamined in the light of present-day constitutional principles.

Early Cases Viewing the Relationship Between the Seventh and Fourteenth Amendments

The Supreme Court was slow in answering the mandate of the Fourteenth Amendment. It was early declared that the Bill of Rights was not incorporated into the Fourteenth Amendment. Indeed, some early decisions almost reached the position of denying claims under the Fourteenth Amendment *because* the matter was covered in the Bill of Rights and ergo, *could not* be covered by the Fourteenth Amendment. Such absolutist thinking has been under continuous reexamination ever since.

The Seventh Amendment was treated not a bit differently from the others. The following early cases formed the basis of numerous rulings that the Seventh Amendment had no application to the states. None of them has anything to do with the power of the state judiciary to overturn jury verdicts.

The *Justices v. Murray*, 76 U.S. 274, concerned the federal, not the state judiciary. The Fourteenth Amendment, just

freshly adopted was not discussed. The latter portion of the statement that federal courts may not re-examine jury verdicts *even though the state courts might do so* was clearly dicta. *Edwards v. Elliott*, 88 U.S. 532, did no more than uphold a state statute which eliminated jury trial in certain cases. The petitioner's complaint in *Pearson v. Yewdall*, 95 U.S. 294 is unclear but the verdict was upheld rather than overturned. The case does not involve jury verdict re-examination.

On reflection, the same is true of *Walker v. Sauvinet*, 92 U.S. 90 upholding a Louisiana statute providing that where the jury fails to agree, the court may render a decision on the same evidence. The statute neither permitted verdicts to be overturned nor did it permit judges to substitute their findings for the opinion of the jury. The statute did no more than partially abolish jury trial, a situation having to do only with Clause One of the Seventh Amendment.

To analyze all subsequent cases discussing the relation of the Seventh Amendment to the states would violate all canons of brevity but they are tabulated in the Appendix (A-1 to A-6). None of them contains a direct and necessary holding that the state courts are not required to observe the Seventh Amendment restrictions on the overturning of verdicts.[4]

FELA Cases in the State Courts

The most frequently cited "later" case is the 1916 decision in *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211. The only necessary holding of this early FELA decision was that

[4] The cases of *St. L. & K. C. Land Co. v. Kansas City*, 241 U.S. 419, and *Wagner Electric Co. v. Lyndon*, 262 U.S. 226, confuse questions of *res judicata* and collateral attack with the Seventh Amendment. The question in both instances was the finality of a prior judgment and the result would have been the same whether the prior case was decided by judge or jury. See *Empire State-Idaho Mining Co. v. Hanley*, 205 U.S. 225.

majority verdicts do not violate due process. A majority verdict statute does no violence to "the traditions of the people of this nation."[5] However, the Court went on and adamantly declared it to have been "conclusively determined" that *none* of the first ten amendments, are applicable to the states. It was further declared that Congress in enacting the FELA "clearly contemplated" that FELA cases should be tried by state courts "in accordance with the modes of procedure prevailing in such courts." It appears to us that the views expressed regarding both the Bill of Rights and the FELA have been thoroughly rejected.

The FELA received no warmer reception in the courts than did the Fourteenth Amendment. There was "a noticeable tendency in earlier decisions" toward a "narrow intrepretation" of the FELA. 35 Am. Jur., Master and Servant, § 415. The discovery of the act commenced around 1940. In the case of *Brady v. Southern R. Co.*, 320 U.S. 476, this Court, even though denying recovery 5-4, held that while the state courts are not required to provide a jury at all in FELA cases, the jury's verdict must be weighed in accordance with rules of evidence established by federal law *which is precisely the rule for which your petitioners contend.* Other decisions have made it clear that a state court may not substitute its opinion of the facts for the jury's findings:

> "The fact that fair-minded men might reach different conclusions, emphasize[s] the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence. * * * To withdraw such a question from the jury is to usurp its functions.
>
> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' * * * Reasonable care and cause and effect are as

[5] Concurring opinion, *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123.

elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries." *Bailey v. Central Vt. Ry.*, 319 U.S. 350.

In *Lavender v. Kurn*, 327 U.S. 645, it was held "It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." In *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, it was held to be important to grant certiorari "when lower federal *and state courts* persistently deprive litigants of their right to a jury determination" (Emphasis supplied). In the recent cases of *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, and *Dennis v. Denver & R.G.W.R. Co.*, 375 U.S. 208, the Court reiterated and re-enforced its position that not only are the observable physical facts for the jury, but that the inferences and deductions leading to the conclusion of liability are jury questions as well.

The foregoing cases all came up from state courts. This is the standard which the states must follow in trying FELA cases. FELA cases are statutory, but nothing on the face of the statute provides for a more liberal standard of jury trial than in other cases. We suggest that it is the re-examination clause of the Seventh Amendment and not the language of the statute which requires jury verdicts to be honored if any evidence can be found to support them. Such is the position taken by the concurring opinion in *Harris v. Penna. R. Co.*, 361 U.S. 15: "Jury trial—guaranteed by the *Seventh Amendment*" is "part and parcel of the remedy under this Federal Act *when suit is brought in state courts*" (Our emphasis).

The Standard for Weighing the Verdict in Other Cases

In *Dick v. New York Life Ins. Co.*, 359 U.S. 437, this Court relied on FELA decisions and held that it was the function of the jury, not the court to choose among conflicting in-

ferences. Again citing FELA cases in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, this Court indicated that the same standards must be applied for weighing a jury verdict in all cases. The Court said that "neither we nor the Court of Appeals can redetermine facts found by the jury," that trial by jury is part of the remedy and "It is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'"

The rule has been repeatedly stated and applied. In an 1891 suit on a life policy containing a "non-drinking" clause, it was held:

> "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. * * * We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted." *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91.

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 was a conspiracy action just as the case at bar. It was held that before taking the case from the jury, the evidence had to be viewed in the light most favorable to the opposing party and that it must receive "the benefit of all inferences which the evidence fairly supports." Further, "'(T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'"

The case of *Phillips Pet. Co. v. Gibson*, 232 F. 2d 13 (5th, 1956) arose in Texas just as the case at bar. A welder working on an oil well drilling rig won a verdict for injuries sustained in an explosion. The Court of Appeals reversed concluding that the plaintiff failed to take any precautions for his own safety and was therefore barred from recovery. This Court reversed summarily thereby re-asserting that the failure of the plaintiff to observe the prudent man rule is as much a question of fact for jury determination as the

defendant's failure to do so. *Gibson v. Phillips Pet. Co.*, 352 U.S. 874. Petitioners Sitton have also been deprived of a jury verdict upon a court-made determination of failure to observe prudent man standards.

> "What is the significance of the Supreme Court's decision? Clearly it will not attempt to supervise the lower federal courts in all their applications of local law in diversity cases. * * * The conclusion is that the Supreme Court was not willing to go along with the Texas court in the determination of this issue as a matter of law by virtue of the local doctrine.
>
> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th amendment. The doctrine of the Texas court is a transparent device to syphon off the power of the jury by converting a question of fact into a question of law.
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> * * * * *
>
> "In Texas, especially, by virtue of its complex proximate cause and negligence *per se* doctrines buttressed by intricate and numerous special issues, jury trial has been greatly impaired. * * * The *Gibson* case may well open a broad attack on those doctrines where federal courts are constrained to follow what is apparently local substantive law but in fact only devices for restricting jury trial." Green, Protection of Jury Trial in Diversity Cases, 35 Tex. L. Rev. 768 (1957)

In *Mercer v. Theriot*, 377 U.S. 152, the plaintiff's decedent was killed by a hit and run driver. The plaintiff relied on circumstantial evidence alone. It was shown that the defendant had been drinking heavily immediately beforehand, that he passed by the scene of the accident close to the time of death, that the decedent was obviously struck by a car, that recent damage was found on the defendant's car and that a towel with blood-like stains was found beneath the seat by investigating officers. "The evidence was sufficient under any standard which might be appropriate—state or

federal. * * * The jury's verdict, therefore, should not have been disturbed." We suggest that when a deed is admittedly altered after its execution at a title company office at the request of the grantee, the jury is not obligated to believe that an innocent mistake occurred and that the evidence of conspiracy is here sufficient "under any standard which might be appropriate" even without the testimony of the V.A. agent that "Moorman told me he had her do it and she told me she did it" (A- 25)

Other cases holding that the courts may not substitute their opinion of the facts for the findings of the jury are *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (Accidental death claim, jury found the fatal heart attack was caused by deceased's falling from horse; Court of Appeals, 210 F. 2d 477, found other theories of death to be equally consistent and declared verdict based on "speculation". Verdict reinstated by Supreme Court.); and *Union Trust Co. v. Eastern Air Lines*, 350 U.S. 907 (Airplane crash; Court of Appeals, 221 F. 2d 62, 70-73, ordered new trial because testimony that plane attempted landing without permission so weak as to have "no probative force". Verdict reinstated by Supreme Court.)

All FELA cases cited came up from the state courts. The remaining cases were tried in the federal courts and principally involve diversity jurisdiction. The conclusion cannot be escaped that the Supreme Court of the United States considers that under Clause Two of Amendment Seven the role of the jury as the finder of fact is paramount. On these authorities, we submit:

(1) The Seventh Amendment clause against re-examination applies in full vigor to the state courts when they are hearing federal matters.

(2) The Seventh Amendment clause against re-examination applies with equal vigor to the federal courts when they are hearing non-federal matters.

(3) The only question remaining open is the one we present here today: Does the Seventh Amendment clause against re-examination apply to the state courts when they are trying non-federal matters? We say there should be no distinction.

The only conceivable reason for refusing to apply a uniform rule would have to lie in the policy of allowing wide latitude to the citizenry of a state in shaping their laws and institutions. But what theoretical basis is there for allowing more latitude in the one instance than in the other? We are dealing in every instance with the rights of the citizens of the United States. We submit that the latitude lies *with the people* and not with the judges of the state courts as individuals. When state judges call a jury in obedience to the mandate of their electorate and proceed to substitute their opinion of the facts for the opinion of the jury, they are perverting both state and national interests. It hardly appears that they are serving a sufficiently valid objective to warrant withholding from the citizens of the United States the full benefit of Clause Two of the Seventh Amendment to the United States Constitution.[6]

The Fundamental Nature of the Amendments

There has long been a minority view that the Fourteenth Amendment made the entire Bill of Rights applicable to the states. While this view has not prevailed, the Court has con-

[6] The *Bombolis* decision views with alarm the prospect that "hybridization" might occur and the procedure in "both state and Federal courts would from day to day depend * * * [upon] the mere subject-matter of the controversy." With respect to federal diversity cases, the "hybridization" issue has been resolved by declaring that Clause One of the Seventh Amendment requires trial by jury even though state law may provide otherwise. *Simler v. Conner*, 372 U.S. 221.

Petitioners ask that the "hybridization" issue be resolved with respect to the state courts by declaring that Clause Two prevents the court from substituting its opinion for the findings of the jury regardless of the subject matter of the case.

tinued the process of selectively holding that various guaranties expressed in the first eight Amendments apply to state action. Even before the *Bombolis* decision, the adamant position there taken that the Fourteenth Amendment had no connection with the Bill of Rights had already been pierced in the case of *Chicago R. & Q.R. Co. v. Chicago*, 166 U.S. 226, where the Court without noticing that the same restriction was incorporated in the Fifth Amendment held that the Fourteenth Amendment prohibited the taking of property for public use without compensation.

In *Abington School Dist. v. Schempp*, 374 U.S. 203, 215-216, a long series of cases was cited leading up to the proposition that all phases of the First Amendment were included in "'the fundamental concept of liberty embodied in that (Fourteenth) Amendment.'"

It was frequently stated in the early cases that the Sixth Amendment does not prevent the states from abolishing jury trial in criminal cases. Some of the cases went even further and inferred that inasmuch as no jury trial was required of the states by the Sixth Amendment, it was not necessary for a fair and impartial jury to be furnished. Such untenable inferences have been completely rejected by a series of cases leading to the conclusion that wherever the state provides for the accused to be tried by jury, the Fourteenth Amendment requires that not only the trial but the arrest and all proceedings leading up to the trial fully comply with the Fourth, Fifth, and Sixth Amendments.

The prohibition against unreasonable searches and seizures was applied to the states in *Mapp v. Ohio*, 367 U.S. 643. It was held that the prohibition would be no more than "a form of words" unless enforced against the states in the same manner as enforced against the Federal government; that is, by completely excluding the contaminated evidence. *Id.* 655. Your petitioners would submit that jury trial is equally sub-

ject to being reduced to "a form of words" unless the re-examination clause is enforced against both state and Federal courts in the same manner.

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1.

As matters now stand, the Supreme Court has decided that at least part of each of the first eight Amendments is sufficiently fundamental that the states are obliged under the Fourteenth Amendment to observe them—that is, all but the Seventh Amendment. This Court has not issued a decision directly concerning the application of the Seventh Amendment in the state courts for many years. It has never directly and necessarily ruled upon the application of the clause prohibiting the re-examination of jury verdicts.

Is Clause Two of the Seventh Amendment Fundamental?

Petitioners do not attack the first clause of the Seventh Amendment, they were provided with the form of jury trial but not the substance. Undoubtedly, it was concern that jury trial might be reduced to an empty formality which led the Framers of the Constitution to include a second clause in the Seventh Amendment and which led Mr. Justice Story into describing the Clause Two as "still more important" and "a substantial and independent clause."

A parallel situation was before this Court in *Smith v. Texas*, 311 U.S. 128 (Exclusion of minorities from grand jury service). May we paraphrase:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For [the Court to substitute its opinion of the facts for

the findings of the jury] not only violates our Constitution * * * but is at war with our basic concepts of a democratic society and a representative government. * * * The fact that the written words of a states' laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

"Here, the Texas [Constitution and laws (A-65) hold out great promise.] But by reason of the wide discretion [inherent in the judicial process], it is equally capable of being applied in such a manner as practically to proscribe [any result which the individual judges might personally feel] to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in [Dallas] County." (Insertions ours)

As far as the "fundamentalness" of the civil jury is concerned, the fact that the citizenry of virtually every state has seen fit to insert a civil jury provision in its constitution speaks out more firmly for the right than all the texts and opinion.[1]

"The trial by jury is justly dear to the American people. * * * Every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union." *Parsons v. Bedford*, 28 U.S. 433.

Legal writers from the time of Blackstone have advocated jury trial in the strongest terms:

"The trial by jury is looked upon as the glory of the English law, * * * an advantage in regulating the civil property, * * * the most transcendant privilege, which

[1] For an analysis of state constitutional provisions for jury trial, see the appendix to Mr. Justice Frankfurter's article, Memorandum on "Incorporation" of the Bill of Rights, 78 Harvard L. Rev. 747, 768-783 (1965).

any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. * * * Because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury." Blackstone's Commentaries, Gavit Ed. (1941) 689-90.

He struck at the entire *raison d'etre* of jury trial as follows:

"If [the impartial administration of justice] be entirely entrusted to the magistracy, a select body of men, usually chosen * * * by parties holding the highest offices in the state, their decisions will frequently have an involuntary bias toward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interests and good of the many.

* * * * *

"This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." Id., 690.

Blackstone's reasoning is as timely as tomorrow's newspaper. The judiciary as a class is poorly qualified to represent either the common man or the conscience of the community. The problem compounds as our nation matures, as the concentration of economic power and social prestige increases and as wealth is more frequently transmitted to the third and fourth generation. The centers of economic power and influence always hire the most skilled and experienced lawyers, drawing heavily from their own class. In a period of time, when those lawyers aspire to the judiciary, the same centers of economic power and influence will sponsor them both in reward for favors past and in anticipation of favors future. The ordinary plaintiff is lucky to find a lawyer, any

lawyer willing to undertake the risk that he will go uncompensated if the case fails. The client may think that there is only one adversary in the courtroom although his lawyer will often recognize that there are two, the defense lawyer and the defense-minded judge.

No law that we have ever heard of *requires* that the parties submit their case to a jury. The only reason that a jury is ever called in any case is that one or both parties is dissatisfied with the prospect of leaving the decision of the facts to the judge. To call a jury in many instances is to do no more than equalize an unbalanced situation. The entire theory of our democratic society is one of checks and balances; power and control are to be distributed and counterbalanced to the greatest extent possible. The tendency of the judiciary to override jury verdicts, to substitute their opinion of the facts, is the tendency to destroy an essential element of our system of checks and balances.

> "A system of laws—however just—that exists only in theory is a slim basis for a claim to moral leadership. * * * We must not forget that the role of the courts is not merely to define the right; it is also to administer the remedy. Unless the remedy is actually applied to persons and things, the right is merely a pious idea." Foreword by the Hon. Earl Warren, Civil Justice and the Jury, Prentice-Hall, 1962.

> "A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752.

> "The Fifth, Sixth, *Seventh* and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges. * * *

* Nor is the privilege to call a jury one-sided. It is equally available to a defendant who feels uneasy before a judge who made his career and reputation as a personal injury lawyer and who still enjoys addressing labor rallies.

> "As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men." *Green v. United States*, 356 U.S. 165, 208-209, (Dissenting opinion) (Emphasis supplied).

The Seventh Amendment has long since been held to be so fundamental that it must be followed in the territorial courts.[9] Conflicting statutes of Congress and the territories are not constitutional.

The second clause of the Seventh Amendment has long been considered as fundamental to the operation of the federal courts; so fundamental that it must be applied even in cases removed or otherwise brought up from the state courts.[10]

This Honorable Court acting under the Seventh Amendment has repeatedly declared that trial by jury should be enlarged, not restricted. It has discarded the old rule that when a case goes to the equity docket, the parties lose the right to a jury on claims at law.[11] Wherever possible, the legal issues are to be decided first and before a jury. When a common law claim and an admiralty claim are joined, the entirety is to be tried to a jury. *Fitzgerald v. United States Lines*, 374 U.S. 16. And, concerning the court martial of civilians abroad, the Court has reversed itself and declared that such may not be done. *Reid v. Covert*, 354 U.S. 1.

In *Simler v. Conner*, 372 U.S. 221, it was held that a Federal court must provide this fundamental right in a diversity case even though the state law provided to the contrary. "The federal policy favoring jury trials is of historic and continu-

[9] *Kennon v. Gilmer*, 131 U.S. 22; *Springville v. Thomas*, 166 U.S. 707; *Thompson v. Utah*, 170 U.S. 343; *Dill v. Ebey*, 229 U.S. 199.

[10] *Parsons v. Bedford*, 28 U.S. 433; *The Justices v. Murray*, 76 U.S. 274; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226.

[11] *Beacon Theatres v. Westover*, 359 U.S. 500; *Dairy Queen v. Wood*, 369 U.S. 469.

ing strength." Similarly, in diversity actions where the state's practice considers certain matters to be questions of law for the court, Federal courts must nevertheless submit them to a jury if they are, in essence, questions of fact. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525; *Magenau v. Aetna Freight Lines*, 360 U.S. 273.

And, may we again point out that even though it has been held that a state is not required to afford a jury in FELA cases, this Court considers the "re-examination" clause sufficiently fundamental that it governs state court litigation under the FELA. It is the Seventh Amendment, not the statute that requires that jury verdicts be diligently upheld *Harris v. Penna. R. Co.*, 361 U.S. 15 (Concurring Opinion).

Civil Jury trial stands on the same basis as criminal jury trial in our national Constitution and in practically all state constitutions. The Court has never reconsidered its early premise that the Fourteenth Amendment does not prevent the states from abolishing criminal juries. Nevertheless, a long line of decisions has progressively told the states that when an accused is brought before a jury, all the safeguards to a fair trial that are contained in the Bill of Rights must be employed. All that your petitioners ask is that similar safeguards be employed with respect to civil jury trial.

One thing cannot be more clear. Clause Two of the Seventh Amendment is fundamental to the vitality of the first, for it is the safeguard which converts promise into reality, prevents the delusion of the public, and raises the first to something more than a "pious idea." We question the decisions holding that the states may deny a civil jury but we do not attack them. We do ask this Court to look at civil jury trial and firmly declare:

"Abolish it if you will but usurp it never!!"

JURY TRIAL IS OF HISTORIC AND CONTINUING STRENGTH

"Court Expands Right to Jury Trial" was the headline on May 21, 1968 when Duncan v. Louisiana, 391 U.S.145 and Bloom v. Illinois, 391 U.S.194, were decided. For a

change, a criminal law decision of the Supreme Court met with widespread approbation. Over the years, a fistful of dicta and loose statements had accumulated to establish the principle that the Fourteenth Amendment does not require trial by jury in criminal cases. All precedent was by necessity dicta because no state had ever abolished jury trial with respect to major crime. Jury trial is too sacrosanct for that. All such loose precedents were overthrown "because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice."

Petitioners do not ask that the right to call a jury in a civil case be expanded. That right, equally sacrosanct, has already been thoroughly and widely established. They do ask that the right to recover on a jury verdict be protected by the Fourteenth Amendment to insure that this "fundamental to the American scheme of justice" may be protected.

Even more recent is the case of Grunenthal v. Long Island R.R.Co., 393 U.S. 156, where the Court gave indications that remittiturs in the Federal Court do not violate the Seventh Amendment, but held the remittitur in that case unjustified. Remittitur is not involved in the Sitton's case. The right to order new trials either directly or on condition of remittitur always has been and should be broader than the right to utterly destroy a jury award as done here.

ARBITRARY AND DISCRIMINATORY CONDUCT IS DIRECTLY VIOLATIVE OF THE FOURTEENTH AMENDMENT

Notice carefully that the Texas Constitution contains a provision similar to the Seventh Amendment and the Texas Rules provide that a special verdict shall "be conclusive as to the facts found." Ordinarily the decisions of state courts as to state law are final but there is a clear exception. An arbitrary or discriminatory interpretation of state law violates the due process and equal protection guaranties of the Fourteenth Amendment.

Obviously, the Fourteenth Amendment does not guarantee an error free trial; otherwise, every case would be a due process case. East Crossroads Center, Inc. v. Melon Stuart Co., 245 F.S.191(W.D.Pa.1965). The real question under this point, and a question which the Courts below declined to entertain was: "Was the Texas Court judgment fundamentally unfair?". We renew our motion to refer the case back to the Fifth Circuit so that the Court will examine the record as it did in O'Boyle and expressly answer this question. Alternatively, we ask the Supreme Court to examine the record.

Petitioners produced an unimpeachable and unbiased witness to testify that two of the defendants admitted everything. We cannot conceive how a stronger case for recovery could be presented. The holding of "no evidence" fails to meet any standard for testing the evidence, state or federal. Mercer v. Theriot, 377 U.S.152. "Because a State may dispense with a jury trial, it does not follow that it may substitute trial

by ordeal." Brown v. Mississippi, 297 U.S. 278.

Because of the space limitations, we cite our authorities with only the briefest discussion: Due process and equal protection require a court to follow the settled course of legal proceedings, Pennoyer v. Neff, 95 U.S. 714, which was not done in this case. Lloyd v. Brinck, 35 Tex. 6 (1871); Leyva v. Pacheco, 163 Tex. 638, 358 S.W.2d 547 (1962); West v. Slaughter, 384 S.W.2d 185 (Tex. Civ. App. 1964).

A finding of "no evidence" is a fact finding in and of itself; it cannot be otherwise. A judgment that is based on "no evidence" violates the guaranties of the Fourteenth Amendment. Creswill v. Grand Lodge, 225 U.S. 4; Fiske v. Kansas, 274 U.S. 380. When a court ignores testimony that "Moorman told me he had her do it and she told me she did it" (A-10), and disregards the fact that competent conveyancers simply do not mutilate instruments in the manner shown by this record, then it is the Court's finding of "no evidence" not the jury verdict which is "so totally devoid of evidentiary support as to render * * *(the holding) unconstitutional under the Due Process Clause of the Fourteenth Amendment." Thompson v. Louisville, 362 U.S. 199.

A court must follow the established rules of law, Kilbourn v. Thompson, 103 U.S. 168, 182. A jury verdict is a vested right, a qualified form of property and property may not be deprived [12] except

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12. Chicago B.&Q.R.Co. v. Chicago, 166 U.S. 226 (Condemnation proceedings); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (Discriminatory taxation); Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U.S. 613 (Highway Commission may not require relocation of pipe lines at owner's expense.)

according to the settled course of judicial proceedings uniformly applied. McCullough v. Virginia, 172 U.S.102. Discriminatory reversal of position by an appellate court violates the Fourteenth Amendment; such is the instant case. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S.673.

"Even a dog distinguishes between being stumbled over and being kicked." Holmes, The Common Law, Little Brown & Co., 1938, p.3. The rulings of the state court reflect a conscious indifference to the established law and procedure, a chosen and predetermined effort not to apply the law and not to correctly construe the facts. Which is the more violative of due process, to render judgment where there is no evidence, or to usurp the jury verdict where there is plain evidence? Schware v. Board of Bar Examiners, 353 U.S.232; Thompson v. Louisville, supra. We see no distinction.

We urge that the Court answer the question: "Was the state court judgment of 'no evidence' fundamentally unfair?" The State Court declared that it can find "no specific evidence supporting any part of the verdict"(A-60). In that Court, we devoted the greater part of a 93 page brief to an analysis of the evidence. That brief was Exhibit A-1 in the U.S. District Court and is a part of this record. We submit that such declarations are palpably untenable.

We also invite this Court to carefully examine the opinion of the State Court. Did Blackstone have this type of decision in mind 200 years ago when he spoke of "boldly asserting that to be proved which is not so, or by more artfully suppressing

some circumstances, stretching and warping others, and distinguishing away the remainder." Blackstone's Commentaries, supra,690. If this Court agrees, it cannot but hold that such a conscious and willed departure from the established rules of law relegating questions of fact to the jury constitutes a violation of the Fourteenth Amendment.

STATE LAW

We do not find where the Texas Court of Civil Appeals ruled on any propositions of law. Including the statement that the Court finds "no such evidence" that petitioners' "constitutional rights were violated", we find thirteen separate rulings of "no evidence" or the equivalent thereof in the opinion below. In closing, the Court magnanimously declared that petitioners had been given "every reasonable opportunity to make out a case" and "they failed to do so." If there are any principles of state law which prevent recovery for this type of forgery, the Court could have succinctly stated them and would have been spared the necessity of buffetting the evidence so extensively. The fact that the Court cited no authority beginning to approach the facts of this case further shows that the Court concerned itself with evidence, not with law.

At the same time, statements such as the one that the Court can find no evidence that any respondent conspired to do any act which nullified "any enforceable agreement", injects doubt as to just what was the basis of the decision. In their motion for rehearing, petitioners requested several findings of fact, distinctly separated from findings of law (Apts.M/Rehg,etc.Ct.Civ.App., A-1-7). Even though the rules providing

for the return of findings of fact speak in mandatory terms,[16] petitioners' request was overruled. Petitioners submit that if the Court presented any rulings on the law, they are without substance. A Court cannot avoid constitutional questions by making untenable rulings upon state law. Stern & Gressman, Supreme Ct.Prac.(4th Ed.) 138-142. If the Court is in doubt whether any point of state is involved, our motion to refer the case back to the Fifth Circuit should be granted.

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16. Rules 453-455, Tex.Rules Civ.Proc.

Texas follows the general law concerning conspiracy. The definition given by the Court (A-55) or an approximation thereof is widely accepted. Analysis of the cases shows that the tort has two well-defined elements: (1) joint endeavor and (2) individually tortious conduct. Neither intrigue nor immorality nor grossly unfair conduct make a conspiracy. With certain distinctions not here material, there must be conduct which would have been actionable if carried out individually. However, the conduct shown by this record was forgery, no less.

With respect to joint endeavor, the evidence shows that respondents solicited the trust and confidence of petitioners, that they represented that "Moorman would assume the debt" (A-53), that the forgery was performed "in the office of the title company" (A-53), that Moorman scouted up the spurious grantee (A-53), that Summer was the only one who could bring pressure to bear on the title company (A- 34, 35&38), that he stood to lose a substantial commission when Moorman refused to conclude the transaction on the basis of an "assumption" deed (P's. Ex. 7, Exhibit Vol.), that all three told Mrs. Sitton the same false story about an "open" deed (A-38 &39); and that respondents Brown and Moorman admitted everything to the V.A. representative (A-22 to 25). How can anyone maintain a straight face and declare that the record is devoid of evidence that the alteration was a product of the joint endeavor of "two or more persons" (A-55).[17]

The Court's opinion infers but fails to hold that there must not only be proof of tortious overt acts and participation therein, but that the plaintiff must further prove a nebulous element entitled "concerted action." There is no

[17] Again, the liability of Summer is of secondary concern at this moment. Where several are charged with conspiracy, judgment may go for some and against others. *St. Louis & S.W.R.Co. v. Thompson*, 102 Tex. 89,113 S.W. 144 (1908) (Cited in opinion, A-42); *Underwood v. Winkel*, 249 S.W. 1111 (Tex. Civ. App. 1923).

such authority. Neither the Court's authorities nor the thirty case shotgun barrage laid down by respondents so holds.

However, our point is that, if any such mystical element is contained in the tort, it is a jury issue. It is a subjective finding just as the concepts negligence, proximate cause, foreseeability, malice aforethought, scienter, etc. The fact that such are wholly subjective and can never be proved or disproved to a certainty does not make them any-the-less *jury issues*. The jury was charged (Issue 2, A-41) on "concerted action" practically *ipsissimis verbis* with the opinion (A-55) and it returned in favor of petitioners. This, we present, is yet another instance of the substitution of the Court's opinion for the findings of the jury.

> "The Deputy Commissioner treated the question * * * as a question of 'fact.' Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact.' Here of course it does not connote a simple, external, physical event * * * Yet the standards are not * * * of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'" *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504.

Conspiracy, like negligence is a concept of tort law which "cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre," *Schulz v. Penna. R. Co.*, 350 U.S. 523, 525. It calls, therefore, "for the exercise of common sense and sound judgment under the circumstances of particular cases;" a fact issue for the jury. *Ibid.*

The Court speaks of nullifying an "enforceable" agreement and points out that the initial sales contract prepared by real estate agent Summer was silent concerning the assumption by Moorman of petitioners' G.I. loan. Petitioners say that respondent Summer in dealing with these people

of limited education deliberately omitted any such provision from the sales contract (A-37 & 38) while verbally assuring petitioners that Moorman would do so (A-53) and that he later prevailed on title agent Brown to make the alteration. Inasmuch as the initial agreement was silent regarding assumption, this was a matter to be covered by other agreements or negotiations. Any question was concluded by the terms of petitioners' G.I. deed and all other agreements and negotiations were merged therein. *Sunderman v. Roberts*, 213 S.W. 2d 705 (Tex. Civ. App. 1948) The Court itself overruled American's cross point urging that the contract controlled over the deed[18] (A-61).

In a single paragraph the Court declared there is no evidence that Moorman agreed to pay or that he accepted a deed obligating him to pay or would have accepted such a deed or that respondent Brown was his agent or that he ratified her conduct or that he knew of the assumption provision or that the instrument was ever delivered or that he ever accepted it. The Court further states that the instrument was altered before it was "delivered to any one" (A-56).

Most of these rulings fly straight in the face of the evidence, particularly the testimony of the V.A. agent; still another instance of Court-made findings in a jury case. We think that the law of agency, ratification, contracts, conveyances, etc., has no application and that the entire paragraph is wiped out by the final statement that this suit is "strictly one in tort." Call it forgery by joint endeavor or call it conspiracy, the elements are identical. The ruling is a virtual license to commit fraud to brokers and conveyancers. We ask: If Moorman had altered the instrument with his own hand while chanting "I do not accept, I will not pay, I do not ratify, I refuse to be obligated and I am

[18] Cross-Point 1. "The rights of the Appellants herein were no greater than those spelled out in the contract of sale and such contract of sale did not require any one to assume existing indebtedness on the Andover house." (Brief for American, et al. 49-50)

not taking delivery of this instrument," would his conduct or his declarations control? We further ask: Is the situation one whit different when he secures another to perform his forgery for him?

Nor is the testimony of McMaster, either in its entirety or the snatch thereof which the Court describes as "all we find," to be dismissed out of hand as "clearly hearsay" (A-55 &56). The Court itself overruled Duckworth's Cross point attacking the McMaster testimony as hearsay[19] (A-61). The declarations by Moorman are *clearly admissible* against Moorman and the statements by Brown are *clearly admissible* against Brown. Taken together, they prove the conspiracy. The law could hardly be otherwise.[20] Johnson v. Lagow, 14 S.W.2d 818(Tex.Comm.App.1929); International Bankers Life Ins.Co.v.Holloway, 368 S.W.2d 567(Tex.1963)

The respondents filed a total of thirty cross-points, eight of which were sustained (A-61 to 63. Cross-points have the same function in Texas practice as a conditional motion for new trial in federal practice. They are filed as the basis for obtaining a new trial in case the judgment *n.o.v.* be reversed.[21] We do not think the matters therein contained are substantial but the proper disposition of these cross-points will not arise until this honorable Court elects to reverse.

Mental and Physical Suffering

Petitioners' right to recover for emotional upset and physical suffering pursuant to the numerous letters and collection contacts, the loss of credit and the impairment of Mr. Sit-

[19] Cross-Point 1. "The court erred in allowing the testimony of the witness Daniel H. McMaster over the timely objection of counsel that it was both hearsay and immaterial to any question properly before the court." (Duckworth Brief 31-32)

[20] The overruler without discussion of petitioners' point three (A-48) concerning the Statute of Frauds is clearly insubstantial. When an instrument is destroyed, the statute is satisfied by proving its former existence. *Patrick v. Badger*, 41 S.W. 538 (Tex. Civ. App. 1897) Such would be particularly true where the obligor caused the destruction in an effort to evade the obligation.

[21] Rule 324, Tex. Rules Civ. Proc.

tons veteran's benefits is not dispositive because he also seeks to recover the mortgage deficiency assessed against him by the U.S. District Court.[22]

This is not a "harrassment" case. The loan company demanded payment by letter and by phone but it had a right to do so. The V.A. did likewise. Demands by "The Federal Government" are apt to be quite upsetting to people of limited education but demands for payment by public or private agencies have a social utility and are privileged as long as they remain within wide bounds of reasonableness. In the case at bar, the gist of the tort is reckless and wilful interference with a valuable relationship. The intermeddler is liable for causing damages even though the ultimate actor is privileged. The best example is those cases where wilful intermeddlers cause employees at will to be discharged from their jobs. *Cotton v. Cooper*, 209 S.W. 135 (Tex. Comm. App. 1919); *Harris v. Trader's & General Ins. Co.*, 82 S.W. 2d (Tex. Civ. App. 1935).[23]

[22] The seriousness of the recurrence of Mr. Sitton's speech impediment cannot be captured on a written record but the jury received demonstrative evidence thereof. A medical witness described him as "very labile" and expressed concern that the events had "stirred up an emotional well". (Testimony 360-361) His employer corroborated his emotional upset and the decline in his work. (Testimony 353-356) After seeing him and hearing the evidence, the jury awarded him $30,000

Mrs. Sitton testified to continued upset over an extended period of time, compounded by worry over her husband's declining health. Her difficulties are not restricted to her fall from an automobile; they merely include this unfortunate fall. There is no doubt she fell, the only question is causation. The defendants objected that her fall had "no causal connection," the trial court ruled "It goes more to the weight than to the admissibility * * * I will allow the evidence to be considered" (Testimony 301-302). It thereafter asked the jury to fix her damages as a whole and the jury found her entire damages at $10,000

[23] Note also that in *St. Louis & S.W.R. Co. v. Thompson*, 102 Tex. 89, 113 S.W. 144 (1908), cited in the opinion, that a third party, the international union, innocently made the publication complained of and that the suit was against those wilfully *causing* the publication.

The law has long allowed compensation for emotional upset and attendant physical suffering in cases of wilful injury such as assault without physical battery, false imprisonment and more recently, invasion of privacy. While views are widely divergent, the present-day trend is to allow damages for emotionally induced injuries even in negligence cases. *Falzone v. Busch*, 45 N.J. 559, 214 A. 2d 12 (1965); *Battalla v. New York*, 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961) *As far as Texas law is concerned, the Court reviewed *the very cases upon which petitioners rely* and declared that recoverability is "now well settled" [24] Nevertheless, it ruled that the plaintiffs could not recover because, *in the Court's opinion*, the petitioners failed to act as the ordinary and prudent man would act under the same or similar circumstances. Such ruling raises two federal questions: [25]

1) It appears to us that the alleged failure to apply to the V.A. for relief is more properly classifiable as failure to mitigate (which reduces damages *pro tanto*) rather than contributory negligence (which bars recovery). However, the label is unimportant. Whether we speak in terms of failure to mitigate or contributory negligence or assumption of risk or voluntary exposure to known hazards or various other labels, it is completely obvious when we look beneath the verbiage that the Court is ruling that the plaintiff violated the prudent man rule. We suggest that the plaintiffs' conduct is just as much a jury issue as the defendants' conduct and that the Court has indulged in "a transparent device to syphon off the power of the jury." Green, Protection of

[24] In addition, see *St. Louis & S.W.R. Co. v. Alexander*, 106 Tex. 518, 172 S.W. 709 (1915); *Houston Elec. Co. v. Dorsett*, 145 Tex. 95, 194 S.W. 2d 546 (1946) and *Stafford v. Steward*, 295 S.W. 2d 665 (Tex. Civ. App. 1956).

[25] The Court's ruling further violates local practice. Respondents waived the right to have the jury consider the plaintiffs' conduct by failing to present any pleadings or request any charge on the matter.

* See also Crisci v. Security Ins.Co.426 P.2d 173 (1967)

Jury Trial in Diversity Cases, 35 Tex. L.Rev.768 (1957); Dice v. Akron,C.&Y.R. Co.,342 U.S.359; Hodges v. Easton,106 U.S.408.

2) We further submit that the purpose and effect of the veteran's relief statute, 38 U.S.C., s 1820(a)(4), quoted and discussed in the Court's opinion is strictly a matter of federal law. This statute was enacted solely for the protection of veterans. A veteran has no duty to invoke the statute for the benefit of a grantee who may contractually assume his loan; certainly there is no obligation to forgers and intermeddlers. "Absent duty; there can be no actionable negligence." Central Stikstof v. Pennsacola, 316 F.2d 189(5th, 1963). Any other construction strips the veteran of protection afforded to him by Congress and thrusts private obligations off into the federal treasury. Rather than beg for charity, Mr. Sitton attempted to make payments (Pleadings 25, Testimony 350-351). He had the absolute and unqualified right to so elect without forfeiting any rights against third parties.

CERTIORARI IS NECESSARY TO PROTECT THE INTEGRITY OF TRIAL BY JURY

Special and important reasons for certiorari exist here because the State Court has directly refused to be bound by Clause Two of the Seventh Amendment and the Federal Courts have done likewise by bottoming their judgment to the State Court's judgment steadfastly declining to examine that State Court judgment for any constitutional defects. The holding of no federal jurisdiction in a case where the United States is a party is an unwarranted and a troublesome extension of Rooker v. Fidelity Trust Co. The

Rooker doctrine has not been re-examined for many years. The application in the state courts of the clause prohibiting the re-examination of verdicts is a matter which has never been decided head-on.

In recent years, there have been numerous scathing attacks upon the Supreme Court of our land for its forthright decisions concerning crime, school prayer and civil rights. However, decisions reaffirming the right of jury trial, civil and criminal, have met with almost universal approval. The American people put a high value on trial by jury. They view it as their protection from arbitrary judicial conduct.

Since these petitioners last approached the Supreme Court, the right to trial by jury, in both civil and criminal actions, has been strengthened. We do not ask the Court to declare that litigants in a civil trial are entitled to a jury as a matter of right. But, the disposition of the first clause of the Amendment does not control the disposition of the second. Obviously, if the State Court had arbitrarily ruled:

> "We refuse to grant a judgment on the verdict in this case because we disagree with the jury's findings,"

there would be a clearcut case of denial of due process. While the State judges have been more circumspect in their pronouncements, we submit that this is exactly what has happened. While the situation is extreme, it is not isolated. Professor Leon Green has thoroughly spotlighted the problem:

> "The taking over of the jury's functions in negligence cases by appellate courts

> has been steadily progressing everywhere but, I believe, in no other American jurisdiction at such a pace and so completely as in Texas. * * * In a jurisdiction where jury trial is embedded in the constitution, and at a time when the intelligence of laymen has risen to such a high level, the change is not so easily accounted for.
>
> * * * * *
>
> "There is nothing to prevent this invasion of the jury's province except the self-restraint of the judges themselves. * * * The supreme power in a court system as in any other heirarchy inevitably increases with its exercise." Green, Jury Trial and Proximate Cause, 35 Tex. L. Rev. 357-358 (1958) (Emphasis supplied).[26]

Other writers have noted the tendency of the courts to substitute their opinion of the facts for the opinion of the jury.[27]

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to

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[26] Professor Green's views are further expressed in Green, Jury Trial & Mr. Justice Black, 65 Yale L.J. 482, 485-486 (1956); Green, The Thrust of Tort Law: II, 64 W.Va. L. Rev. 115, 134-135 (1962); Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42, 70-74 (1962); Green, Observations: The Importance of Identifying The Issue, 42 Tex. L. Rev. 835, 840 (1964).

[27] Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957); Blum, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555 (1950); Tongue, In Defense of Juries As Exclusive Judges of the Facts, 35 Ore. L. Rev. 143 (1956). See also Kreindler, The Jury System in Tort Cases, 51 A.B.A.J. 736 (1965); Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964); Sacks, Preservation of the Civil Jury System, 22 Wash. & Lee L. Rev. 76 (1965).

> see that constitutional right preserved. * * * Our duty to preserve this one of the Bill of Rights may be peculiarly difficult for here it is our own power which we must restrain. * * * I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. * * * Appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances." Galloway v. United States, 319 U.S.372,407 (Dissenting opinion)(Emphasis supplied).

We do not seek to throw an impossible burden on the Supreme Court. Compared to the large number of felony convictions affirmed, the number of instances where state courts substitute their opinion of the facts for the findings of the jury is still quite small. But the trend is growing. "Two or three forthright decisions outlining the permissible limitations on jury trial as preserved by the 7th amendment" will go far to stem the tide. Green, Protection of Jury Trial in Diversity Cases, 35 Tex.L.Rev.768,771 (1957).

Jury trial is one of the fine checks and balances of our democratic society. The litigants are never forced to try their case before a jury, the jury is only called when a party expresses dissatisfaction with trial by judge. Jury trial is not perfect but the courts are not powerless to restrain unwarranted verdicts. They decide rules of evidence, lay the burden of proof and instruct the jury. New trials and remittiturs are

available when the court finds the verdict to be completely unreasonable or shockingly unconscionable in amount. But, to approve of the judiciary totally depriving the plaintiff of his day in court save in those limited instances where he cannot recover under any construction of the evidence is the opening blow to rip the substance away from the form. The public should not be deluded. This great institution should not be drained of vitality and left to stand as an empty facade.

In the final analysis, the tort law is much more than a fine drawn web of legal reasoning, it is the conscience of the community in action. Green, Tort Law: Public Law in Disguise 38 Tex.L.Rev.1,257,269 (1960). Not only does it provide compensation for those damaged by another, it encourages motorists to buy insurance, railroads to build overpasses and store managers to keep banana peels off the floor. It is the function of the courts and the legislature to set standards of conduct and to delimit the field of liability. However, when one citizen is pitted against another in a courtroom, who is less apt to become subjected to the influence of vested interests, who is better qualified to speak for the entire community, who under our system of government reserving all undelegated powers to the people is the better party to weigh the question of whether there has been any deviation from the contemporary standards of fair and reasonable conduct?

The hardest restraint of all is self restraint. It is impossible for juries to usurp the functions of judges but the process of usurping the jury's function has gone far. Clause One of the Seventh Amendment may not be essential to ordered liberty. But Clause Two is the very heart of the system

of trial by jury. We ask the interposition of the Supreme Court to stem the "gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." Galloway v. United States, 319 U.S.372,397 (Dissenting opinion).

PRAYER

For the reasons given, your petitioners ask that this petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

January 20, 1970

William T. Andress, Jr.
627 Fidelity Union Life Bldg.
Dallas, Texas 75201

ATTORNEY FOR PETITIONERS

Of Counsel:
CHARLES BEN HOWELL

Decisions of the Supreme Court Since 1868 Discussing Applicability of Seventh Amendment Guaranties to State Court Litigation

Note—this listing is submitted in support of petitioners' proposition that the applicability of Clause Two of the Seventh Amendment to state court litigation has never been directly and necessarily passed upon. The list is exhaustive and includes many cases where the discussion was very offhand. While many sources have been checked, primary reliance has been laid upon the Statute Edition of Shepard's United States Citator. That work also contains many citations discussing the application of the Seventh Amendment in the Federal courts which have been omitted. Numerous additional FELA cases brought up from state courts have also been omitted because there was no express discussion of the Seventh Amendment.

KEY (A)—Civil case originating in state court
(B)—Civil case originating in Federal court
(C)—Criminal case originating in state court
(D)—Case does NOT involve claim that court below re-examined facts tried by jury.
(E)—Case does involve claim that court below re-examined facts tried by jury.
(F)—Civil case in which petitioner claimed violation of 1st Clause, 7th Admt.; i.e., claimed state law unconstitutionally prohibited trial by jury in his case.
(G)—Case involving application of 7th Amdt. in territories and D.C.
(H)—Petitioner attacked state laws allowing majority verdicts or "bobtailed" juries.
(I)—FELA case
(J)—Statement in dissenting opinion
(K)—Statement in concurring opinion
(L)—Dicta

The Justices v. Murray, 76 U.S. 274. (A) (E) (L) Discussed in text.

Hornbuckle v. Toombs, 85 U.S. 648. (D) (G)

Edwards v. Elliot, 88 U.S. 532. (A) (D) (F) Discussed in text.

KEY (A)—Civil case originating in state court

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(I)—FELA case

(J)—Statement in dissenting opinion

(K)—Statement in concurring opinion

(L)—Dicta

Insurance Co. v. Dunn, 86 U.S. 214. (A) Where state allows trial de novo as a matter of right, it does not violate 7th Amdt. for federal court to grant trial de novo after removal.

Walker v. Sauvinet, 92 U.S. 90, (A) (D) (F) Discussed in text.

Pearson v. Yewdall, 95 U.S. 294. (A) (D) (L)

Ex parte Virginia, 100 U.S. 339, 354. (C) (D) (J)

Missouri v. Lewis, 101 U.S. 22, 31-32, (A) (D) (L)

Hurtato v. California, 110 U.S. 516, 533. (C) (D) (F) Grand juries may be abolished.

L. & N. R. Co. v. Woodson, 134 U.S. 614. (A) (D) State statute prohibiting more than two new trials for insufficient evidence not unconstitutional.

Scott v. Neely, 140 U.S. 106, 109. (B) (D) (F) (L)

Cates v. Allen, 149 U.S. 451. (A) (D) (F)

Iowa Cent. R. Co. v. Iowa, 160 U.S. 389, 392. (A) (D) (L) The dicta stating that no constitutional issue is involved where jury trial is denied through erroneous interpretation of state law

must be considered as limited by the "mere error" rule. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Thompson v. Louisville*, 362 U.S. 199.

Grayson v. Lynch, 163 U.S. 468, 475. (G)

Walker v. N. M. & S. P. R. Co., 165 U.S. 593. (G)

C. B. & Q. R. Co. v. Chicago, 166 U.S. 226. (A) (D) (L) Discussed in text.

American Pub. Co v. Fisher, 166 U.S. 464. (G)

Springville v. Thomas, 166 U.S. 707. (G) Discussed in text.

Wilson v. North Carolina, 169 U.S. 586, 595. (A) (D) (F)

Thompson v. Utah, 170 U.S. 343, 347. (C) (H)

Chappell v. Sulphur, 172 U.S. 472 (A) (D) (F) Statute regulating jury demand not unconstitutional.

Capital Traction Co. v. Hof, 174 U.S. 1. (E) (G) (L) Justice court in D.C. is not a common law court; 7th Amdt. does not prohibit trial *de novo*.

Maxwell v. Dow, 176 U.S. 581, 586, 598. (C) (H)

Chapin v. Fye, 179 U.S. 127. (A) (D) (L)

Smiley v. Kansas, 196 U.S. 447, 454. (A) (D)

Twining v. New Jersey, 211 U.S. 78, 98. (C) (D) (L)

Creswill v. Grand Lodge, 225 U.S. 246. (A) Verdict reversed by U.S. Supreme Court where no supporting evidence. Discussed in text.

Slocum v. New York Life Ins. Co., 228 U.S. 364. (B) (E) Held error to reverse without granting new trial.

Dill v. Ebey, 229 U.S. 199. (A) (D) (F)

Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211. (A) (D) (H) (I) Discussed in text.

St. L. & S. F. R. Co. v. Brown, 241 U.S. 223. (A) (D) (H) (I)

Chesapeake & O. R. Co. v. Carnahan, 241 U.S. 241. (A) (D) (H) (I)

Louisville & N. R. Co. v. Stewart, 241 U.S. 261. (A) (D) (H) (I)

St. L. & K. C. Land Co. v. Kansas City, 241 U.S. 419, 431. (A) (E) Discussed in text.

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Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485. (A) (D) (H) (I)

Chesapeake & O. R. Co. v. Gainey, 241 U.S. 494. (A) (D) (H) (I)

New York Cent. R. Co. v. White, 243 U.S. 188, 208. (A) (D) (F) Workmen's Compensation[1]

Hawkins v. Bleakly, 243 U.S. 210, 216. (B) (D) (F) Workmen's Compensation. See footnote 1.

Mountain Timber Co. v. Washington, 243 U.S. 219, 235. (A) (D) (F) See footnote 1.

Wear v. Kansas, 245 U.S. 154. (A) (D) (F)

Chicago, R. I. & P. R. Co. v. Cole, 251 U.S. 54. (A) (D) (L) It is not unconstitutional to *enhance* the right of jury trial.

Chicago, R. I. & P. R. Co. v. Ward, 252 U.S. 18, 19. (A) (D) (H) (I)

Wagner Elec. Co. v. Lyndon, 262 U.S. 226. (A) (E) Discussed in text.

Southern R. Co. v. Durham, 266 U.S. 178. (A) (D) (F)

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[1] Workmen's Compensation case. Compensation statutes have been upheld on the theory that they do away with the right of recovery entirely and nothing is left for the jury to try.

Van Oster v. Kansas, 272 U.S. 465. (A) (D) (F)

Dohany v. Rogers, 281 U.S. 362. (A) (D) (F)

Herron v. Southern Pac. Co., 283 U.S. 91. (B) (E) Federal court not bound by state provision enhancing jury trial; such is contrary to common law.

Crowell v. Benson, 285 U.S. 22. (B) (D) Longshoremen's and Harbor Worker's Compensation Act does not violate 7th Amdt. See footnote 1.

Brown v. Mississippi, 297 U.S. 278, 285. (C) (D) (L) Discussed in text.

Palko v. Connecticut, 302 U.S. 319, 324. (C) (D) (L)

United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 151. (A) (D) (K) A state may extend the use of juries.

Bailey v. Cent. Vt. R. Co., 319 U.S. 350, 358. (A) (E) (I) (J) Verdict reinstated. Discussed in text.

Brady v. Southern R. Co., 320 U.S. 476, 479. (A) (E) (I) Discussed in text.

Malinski v. New York, 324 U.S. 401, 416. (C) (D). Discussed in text.

Adamson v. California, 332 U.S. 46, 78. (C) (D) (J)

Fay v. New York, 332 U.S. 261, 263. (C) (D) (K)

In re Oliver, 333 U.S. 257, 281. (C) (D) (K)

Bute v. Illinois, 333 U.S. 640, 651. (C) (D) (K)

Wilkerson v. McCarthy, 336 U.S. 53, 64. (A) (E) (I) (K) Directed verdict reversed.

Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 365. (A) (E) (I) Verdict reinstated. Discussed in text.

Kinsella v. Krueger, 351 U.S. 470, 475. (D) (F) (L) Criminal case originating in Federal Court. Upholds court martial of civilians abroad. Reversed on rehearing. *Reid v. Covert*, 354 U.S. 1. Discussed in text.

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 508. (A) (E) (I) Verdict reinstated. Discussed in text.

Byrd v. Blue Ridge Co-op., 356 U.S. 525, 537. (B) (E) Jury trial of *all fact issues* required. Discussed in text.

Knapp v. Schweitzer, 357 U.S. 371, 379. (C) (D) (L)

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Bartkus v. Illinois, 359 U.S. 121, 125. (C) (D) (L)

Dick v. New York Life Ins. Co., 359 U.S. 437, 455. (B) (E) (J) (L) Verdict reinstated. Discussed in text.

Magenau v. Aetna Freight Lines, 360 U.S. 273, 282. (B) (E) Jury trial of *all fact issues* required. Discussed in text.

Harris v. Penna. R. Co., 361 U.S. 15, 17. (A) (E) (I) (K) Verdict reinstated. Discussed in text.

Inman v. Baltimore & O. R. Co., 361 U.S. 138, 146. (A) (E) (I) (J) Rule against re-examination affirmed but no negligence found. Take-nothing judgment affirmed.

Gallick v. Baltimore & O. R. Co., 372 U.S. 108, 125. (A) (E) (I) (J) Verdict reinstated. Discussed in text.

Simler v. Conner, 372 U.S. 221, 222. (B) (D) Jury trial required.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 253. (A) (D) (K)

New York Times Co. v. Sullivan, 376 U.S. 254, 285. (A) Rule against re-examination affirmed but no evidence of malice found. Recovery denied.

Malloy v. Hogan, 378 U.S. 1, 4. (C) (D) (L)

Simmons v. Union News Co., 382 U.S.884(B)(D)(J)
Dissent on denial of certiorari
Katchen v. Landy, 382 U.S.323 (B)(D)
Georgia v. Rachel, 384 U.S.780 (C)(D)(L)
Neely v. Eby, 386 U.S.317(B)(E) Dissent that evidence sufficient to support verdict.
Curtis Publishing Co. v. Butts, 388 U.S.130(A)(B)(J)
Detenber v. American Universal Ins.Co.,389 U.S.987 (B)(J) Dissent on denial of certiorari
International Terminal v. N.V.Nederl.Amerik., 393 U.S.75 (B)(E) Reversed
Grunenthal v. Long Island R.R.Co., 393 U.S.156 (B)(E)(I)

JUDGMENT OF U.S. DISTRICT COURT
Northern District of Texas
(Entered November 2,1967)

On the 12th day of October, 1967, came on to be heard in the above numbered and styled cause the Motion for Summary Judgment of the United States of America, Plaintiff; and further came to be heard the Motion for Discovery and the Motion for Summary Judgment of Russell Harold Sitton and Barbara Sitton, Defendants, and further came to be heard the Motions to Dismiss of Third Party Defendants, Walter Moorman and wife, the Motion to Dismiss of Third Party Defendants, Leonard Duckworth Agency, a sole proprietorship owned by Leonard C. Duckworth, Harry Clifton Summer, Jr., Trinity Universal Insurance Company, and Lawyer's Surety Corporation; and further came on to be heard the Motion for Summary Judgment of the Third Party Defendants, American Title Company of Dallas, American Surety, Trinity Universal Insurance Company, Lawyer's Surety Corporation, Leonard Duckworth Agency, a sole proprietorship, owned by Leonard C. Duckworth, Katherine H. Brown, Jarvis L. Brown, Harry Clifton Summer, Jr. and Mr. and Mrs. Walter J. Moorman; and came each of the aforementioned parties herein by and through their attorneys of record, and the Court after having considered all of the pleadings, all of the motions and exhibits filed herein, all affidavits, and having heard the argument of counsel as to each motion filed herein; the Court is of the opinion and finds thatas to the motion of the United States of America For Summary Judgment there are no genuine issues of any material fact and that the United States of America is entitled to a judgment as a matter of law and said Motion for Summary Judgment is in all things granted; and the Court is further of the opinion and finds that the Motions to Dismiss filed herein by Third Party Defendants, Walter J. Moorman and wife, Leonard Duckworth, et al should be in all things sustained as to the complaint and prayer of Third Party Defendants as the state court should have rendered; and the Court having heard the Motion for Discovery of Defendants, Russell

Harold Sitton and wife finds that said motion should be granted insofar as the requested documents are in the possession of the United States of America and the Court further finds that the government exhibits 1 through 7 are the only such documents in the possession of the Plaintiff, United States of America, and such documents are hereby ordered to be produced; and the Court is further of the opinion that the Motion for Summary Judgment filed herein by Russell Harold Sitton and Barbara Sitton as Third Party Plaintiffs should be in all things overruled; and the Court is further of the opinion that the Motions for Summary Judgment filed in this cause by all of the Third Party Defendants herein against Russell Harold Sitton and Barbara Sitton should be in all things sustained as to Third Party Plaintiff's other complaints and prayers for relief and that the Third Party Defendants are entitled to a judgment as a matter of law, that the Third Party Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton, take nothing as to said Third Party Defendants; and

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Motion for Summary Judgment of the United States of America should be in all things granted and it is ORDERED, ADJUDGED, AND DECREED that the United States of America, Plaintiff, shall recover of and from the Defendants, Russell Harold Sitton and Barbara Sitton, judgment in the sum of $488.66, together with interest at the rate of six percent per annum on said sum from this date until paid and for all costs of suit, for all of which let execution issue; and

IT IS FURTHER ORDERED that the Motions for Discovery of Defendants, Russell Harold Sitton and Barbara Sitton, is granted insofar as the requested documents are in the possession of the United States of America and the exhibits designated government's exhibits 1 through 7 are found to be the only such documents in the possession of the Plaintiff, United States of America, and said documents are ordered to be produced.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Motion for Summary Judgment of the

Third Party Plaintiffs, Russell Harold Sitton and Barbara Sitton be and the same is in all things herewith overruled; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Motions for Dismissal for want of jurisdiction of Third Party Defendants, Walter Moorman and wife, Leonard Duckworth, et al be and the same are in all things sustained as to the complaint and prayer of Third Party Plaintiffs for this Court to enter a judgment in said party's favor that the state court should have entered; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Motions for Summary Judgment of the Third Party Defendants be in all things sustained as to Third Party Plaintiff's remaining complaint and prayers for relief and it is further ordered, adjudged, and decreed that the Third Party Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton take nothing of the Third Party Defendants American Title Company of Dallas, American Insurance Company, Trinity Universal Insurance Company, Lawyer's Surety Corporation, Leonard Duckworth Agency, a sole proprietorship, owned by Leonard C. Duckworth, Katherine H. Brown, Jarvis R. Brown, Harry Clifton Summer, Jr., and Mr. and Mrs. Walter J. Moorman and that said Third Party Defendants go hence with their costs.

SIGNED AND RENDERED this 2nd day of November, A.D., 1967.

W.M.Taylor
United States District Judge
(R.281-284)

NOTICE OF APPEAL
(Filed November 27, 1967)

Notice is hereby given that Russell Harold Sitton and Barbara Sitton, Defendants and Third Party Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from all parts of the Final Judgment entered in this action on November 2, 1967.

(R.286)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25685

RUSSELL HAROLD SITTON and BARBARA SITTON,
Appellants,

versus

UNITED STATES OF AMERICA, ET AL,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(July 30, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

JONES, Circuit Judge: In 1960, appellants, Russell and Barbara Sitton, executed, in Texas, a note and deed of trust to T. J. Bettes Company to secure a loan for the purpose of buying a home in Dallas, Texas. At the request of the Sittons, the note was partially guaranteed by the Veterans Administration pursuant to the Servicemen's Readjustment Act of 1944, as amended, 38 U.S.C.A. 1803. The note and deed of trust were subsequently assigned but the T. J. Bettes Com-

pany continued as servicing agent for the loan. On September 7, 1962, the Sittons conveyed the property by deed to W. R. Trout and Joanne Trout who assumed and promised to pay the note. In 1963, the loan became delinquent. Foreclosure followed in 1964. The property was sold for $10,000. After crediting the proceeds of the sale, a balance of $552.20 remained unpaid on the loan which the Veterans Administration as guarantor paid to the holder of the secured obligation. The note was assigned to the Administrator of Veterans Affairs who is the present holder of the note. The whereabouts of the Trouts, who received the property by deed from the Sittons and promised to pay the indebtedness, is not disclosed.

Thereafter, an action was brought by the United States in the District Court for the Northern District of Texas against the Sittons for a judgment in the sum of $482.97, with interest. The $482.97 represents the amount due the United States on the note after all credits. The Sittons appeal from a summary judgment entered against them.

In the district court, the Sittons filed a third party complaint against American Title Company, American Insurance Company, Trinity Universal Insurance Company, Lawyers Surety Corporation, Katherine H. Brown, Jarvis Brown, Leonard C. Duckworth, Harry Clifton Summer, Jr., and Mr. and Mrs. Walter J. Moorman, as third party defendants. The Sittons contended that the names of W. R. Trout and Joanne Trout were subsituted for the name of appellee Walter J. Moor-

man as grantee and that the third party defendants conspired together to alter the Sittons' deed by substituting the Trouts in order that appellee Moorman might not become liable on a covenent to assume the mortgage. The Sittons complain that as a result of this alleged conspiracy they sustained actual and exemplary damages totalling $90,000. They concede that this identical issue was heard in the Texas State courts. The Texas Courts of Civil Appeals affirmed the state district court's judgment that appellant should take nothing in his cause of action against the third party appellees. In *Sitton et ux v. American Title Company of Dallas*, Tex. Civ. App. 1965, 396 S.W.2d 899. The Texas Supreme Court refused to grant the Sittons' application for writ of error. The Supreme Court of the United States denied certiorari. *Sitton v. American Title Co. of Dallas, et al*, 385 U.S. 975, 87 S.Ct. 501, 17 L.Ed.2d 437, reh. den. 385 U.S. 1033, 87 S.Ct. 739, 17 L.Ed.2d 681.

Despite the adverse decision of the Texas courts, the Sittons assert that they are entitled to relief in the Federal court. Appellees answered the third party complaint by denying the allegations, and asserted affirmative defenses of estoppel by judgment, res judicata, and the Texas two-year statute of limitations. The district court granted appellees' motion for summary judgment and also entered judgment dismissing for want of jurisdiction the Sittons' third party complaint.

We turn first to Mrs. Sitton's compelling argument that the Texas law of coverture, in force when the

contract with the Government was made, is a complete defense to recovery on the note as against her. Recently this Court has held that Federal law is to be applied to the question of whether a deficiency judgment should be granted the United States for balances due following foreclosure of mortgages on properties sold to non-veterans under the Vendee Account Loan program of the Administrator of Veterans Affairs. *United States v. Wells*, 5th Cir. 1968, 403 F.2d 596. In Wells, we stated that Federal law had been applied by the courts with respect to the Veterans Loan Guaranty program. 403 F.2d at 598. While this is generally the case, where, as here, the question involves a state law in the "peculiarly state province of family or family-property arrangements," the peculiarly local jurisdiction of the states should not be invaded. *United States v. Yazell*, 382 U.S. 341, 353, 86 S.Ct. 500, 15 L.Ed. 2d 404.

The Government relies in part on *United States v. Helz*, 6th Cir. 1963, 314 F.2d 301, to support its contention that the Texas law of coverture should not bar recovery against Mrs. Sitton. In *United States v. Yazell*, 5th Cir. 1964, 334 F.2d 454, this Court specifically rejected the reasoning of the Helz opinion as completely unfounded and without authority. In affirming our decision, *United States v. Yazell, supra*, the Supreme Court stated:

> "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear

and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

"Each state has its complex of family and family-property arrangements. There is presented in this case no reason for breaching them. We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions such as those involved in this case. Nor should we establish a principle which might cast doubt upon the effectiveness in relevant types of federal suits of the laws of 11 other States relating to the contractual positions of married women, which, as the Government's brief warns us, would be affected by our decision in the present case. Clearly, in the case of these SBA loans there is no "federal interest" which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.

"The decisions of this Court do not compel or embrace the result sought by the Government. None of the cases in which this Court has devised and applied a federal principle

of law superseding state law involved an issue arising from an individually negotiated contract. None of these cases permitted federal imposition and enforcement of liability on a person who, according to state law, was not competent to contract. None of these cases overrode state law in the peculiarly state province of family or family-property arrangements." 382 U.S. 352-353.

The Veterans Loan Guaranty program will not suffer major damage if the Texas law of coverture is applied in this case. This is especially so in light of the fact that the Texas law establishing the doctrine of coverture was repealed in 1963.[1]

We also note that there is no clear statutory authority for overriding the Texas domestic relations law in this case, nor do we have regulations promulgated pursuant to a statute which require us to invade the strong state interest involved here. These factors distinguish *United States v. Shimer*, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908, and *McKnight v. United States*, 9th Cir. 1958, 259 F.2d 540. Furthermore, in *United States v. Yazell*, *supra*, the Supreme Court recognized that there is "no federal law relating to the protection of the separate property of married women." 382 U.S. at 352-353.

Since we find that under the law of Texas, where the contract was made, Mrs. Sitton was protected by

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[1]Tex. Rev. Civ. Stat. Ann. Art 4626 as amended by Acts 1963, 58th Leg., p. 1188, ch. 472, § 6. See also Tex. Rev. Civ. Stat. Ann. Art. 4625 as amended by Acts 1967, 60th Leg., p. 739, ch. 309 § 1.

the doctrine of coverture from personal liability upon the contract, the judgment of the district court with respect to her must be reversed.

Little discussion is necessary to dispose of the Sittons' argument with respect to their third party claim. Title 28 U.S.C.A. § 1345 provides that the district courts have original jurisdiction of all civil actions where the United States is a plaintiff. Even conceding that this section may authorize third party claims, it can in no way be interpreted as a grant to the district courts of the power to act in an appellate capacity to review the propriety of a state court decision. In the prayer of their third party complaint the Sittons expressly asked the district court "that this Court render such judgment against third party defendants as the State Court should have rendered." The appellants now seek to have the federal district court review a state court decision alleged to be erroneous. The district court can not do this. The jurisdiction possessed by the District Courts of the United States is strictly original. "A federal district court has no original jurisdiction to reverse or modify the judgment of a state court." *Hanna v. Home Insurance Company*, 5th Cir. 1960, 281 F.2d 298, cert. denied 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed.2d 747. Federal courts have no authority to act as an appellate arm of the state courts. *Rooker v. Fidelity Trust Company*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362; *Williamson v. Puerifoy*, 5th Cir. 1963, 316 F.2d 774, cert. denied 375 U.S. 967, 84 S.Ct. 485, 11 L.Ed.2d 416; *Hanna v. Home Insurance Company*, *supra*; *Manufacturers Record Pub. Co. v. Lauer*, 5th Cir. 1959, 268 F.2d 187, cert. denied 361 U.S. 913, 80

S.Ct. 258, 4 L.Ed.2d 185; *Resolute Insurance Company v. State of North Carolina*, 4th Cir. 1968, 397 F.2d 586, cert. denied U.S. , 89 S.Ct. 446, L.Ed.2d ; *Jones v. Hulse*, 8th Cir. 1968, 391 F.2d 198; *Pilkinton v. Pilkinton*, 8th Cir. 1968, 389 F.2d 32; *Wood v. Conneaut Lake Park, Inc.*, 3rd Cir. 1967, 386 F. 2d 121. See also *Warriner v. Fink*, 5th Cir. 1962, 307 F.2d 933, cert. denied 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969; Annot. 13 A.L.R.2d 390, 467. The Sittons' proper route of appeal was to the Supreme Court of Texas and then by certiorari to the United States Supreme Court. That course was followed without success.

Furthermore, the dismissal of the third party complaint was clearly proper on the ground of res judicata. The Sittons' claims in the district court were the same as in the state court litigation. "A final, valid determination on the merits is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action." 3 Moore, Federal Practice, par. 0.405 [3], pp. 631-632 (2 Ed. 1965). While a federal court has jurisdiction to hear a collateral attack on a state court judgment which is alleged to have been obtained by fraud, deception, accident, or mistake,[2] this case affords no basis for a collateral attack in a federal court. Hence the district court properly dismissed the third party complaint.

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[2]See, e.g., Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101, 44 S.Ct. 469, 68 L.Ed. 928; 3 Moore, Federal Practice, Par. 0.407 et seq. (2d Ed. 1965).

Two other matters remain to be noted. First, the Sittons contend that the district court erred in holding that the affidavits and exhibits set forth in the Government's motion for summary judgment showed "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Sittons filed no counteraffidavits. They attack the form of the affidavits and exhibits and not their substance. Nothing appears to show that there existed any genuine issue of material fact. We agree with the district court that the showing made by the Government was sufficient. E.g., *Liberty Leasing Co. v. Hillsum Sales Corp.*, 5th Cir. 1967, 380 F.2d 1013; *Robbins v. Gould*, 5th Cir. 1960, 278 F.2d 116.

Finally, the Sittons assert that the interest rate on the judgment was improperly included at 6%. Veterans Administration regulations provide for interest at 4% per annum on the deficiency after a foreclosure sale, but, the regulations are silent regarding interest after judgment. They argue that the general congressional intent to favor veterans as a class, even after default and foreclosure, requires that the 4% rate continue after judgment.

The judgment in this case correctly included interest from the date of judgment at 6% per annum. Such interest is to be calculated at the rate allowed by State law. 28 U.S.C.A. § 1961. The law of Texas establishes that where obligations sued on bear interest at a rate less than 6% per annum, the judgment will bear interest at a rate of 6% per annum after its date. Vernon's Tex. Civ. Stat., Title 79, Art. 5072; *Linz v. Eastland*

County, Tex. Comm. App. 1931, 39 S.W.2d 599. See also *Galveston County Drainage Dist. No. 3 v. Foster*, 5th Cir. 1922, 284 F. 932. To hold that the congressional intent to benefit veterans continues after judgment would require clearer expression than is demonstrated in the statutes or regulations.

We see no error in the judgment of the district court dismissing the third party complaint and in the entry of summary judgment for the third party defendants and these judgments are affirmed. We find no error in the entry of a judgment for the United States and against Russell Sitton and the judgment against him is affirmed. The judgment against Barbara Sitton is in error and is reversed. AFFIRMED IN PART AND REVERSED IN PART.

(R.292)

JUDGMENT
(Entered July 30, 1969)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court.

It is further ordered that Russell Harold Sitton pay the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate (R.293)

EXTENSION OF TIME
(Entered August 8, 1969)

This unopposed motion is hereby granted by the Clerk for the Court by direction this 8 day of Aug, 1969, granted to 9/2, rehearing.

EDWARD W. WADSWORTH
CLERK, U.S. COURT OF APPEALS
BY G.F. Ganucheau

EXTENSION OF TIME
(Entered September 2,1969)

Extension granted to 9/4/69. Petition for Rehearing.

JUDGMENT ON PETITION FOR REHEARING
(Rendered without Opinion)
(Entered October 22, 1969)

Before Jones and Coleman, Circuit Judges, and Choate, District Judge.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED. Pet. for rehearing filed 9/2/69. Pet. for rehearing denied 10/22/69

(R.294)

TRIAL COURT PROCEEDINGS

Testimony of Daniel H. McMaster

Direct Examination By Mr. Howell:

"Q. Would you give your name and occupation to the jury, please? A. Daniel H. McMaster. I am a loan service representative, Veterans Administration. (Testimony 369).

* * * * *

"Q. What transpired when you called on Trout? A. * * * He then told me he was Moorman's employee and I asked him, as I recall, if he had any papers showing that he had title to the property and he gave me the deed.

"Q. Mr. McMaster, at this time, I will hand you Plaintiffs' Exhibit No. 3 and ask you if you have seen it before? A. Yes, this is the deed Trout gave to me that night. [See A-40 infra].

"Q. Thank you, sir. Mr. McMaster, I will ask you if you subsequently called on any other persons with reference to this transaction? A. I then called on Moorman * * * and I showed it to Moorman.

"Q. What were the discussions at that time? A. I asked him to look at the deed carefully and he could see where his name was on the deed and that had been erased and Trout's name had been written in. *He said he knew that* and then I asked him if he would—did he think that was fair to Sitton and would he make up the payments. He said he would not, that was Sitton's responsibility. (Testimony 371, 372)

* * * * *

"Q. (By Mr. Howell) Mr. McMaster, without going into what you said, tell me what Mr. Moorman said further out there that day as far as you can recall. A. Well, he said that was Moorman's—I mean Sitton's responsibility, that he washed his hands of it or something

to that effect. Then I asked him who changed the deed.
[Objection overruled]

"Q. (By Mr. Howell) You asked him who had changed the deed, Mr. McMaster, and what was his reply? A. He told me that Mrs. Brown of the American Title Company had changed the deed.

"Q. What else was said in that meeting? A. I asked him then did he know that was wrong and he said then he would wash his hands of the matter, so I asked him where Mrs. Brown's office was and I proceeded to her office.

"Q. I see, and did you meet and talk with Mrs. Brown? A. I met Mrs. Brown, I showed her my Government identification and I asked her, showed her the deed and I asked her did she change that and she said she did. I then asked her was she in the habit of doing that. *As I recall she did that when it was necessary.*

"Q. That was her statement to you? A. Yes, but it might not have been in those words exactly. I wrote it down on the Government's sheet." (Testimony 373-375)

* * * * *

Cross Examination By Mr. Welch: (Testimony 380)

* * * * *

"Q. Well, now, you were assuming that he assumed the debt, weren't you? A. No, he told me he had.

"Q. Who told you he had? A. Moorman.

"Q. Moorman told you he assumed the debt? A. That he had Mrs. Brown take his name off of the deed and put Trout's on there.

"Q. But you just said that Moorman told you he had assumed the debt? A. Yes. He purchased the house from Sitton.

"Q. He told you he had purchased the house from Sitton? A. Yes.

"Q. He didn't tell you he had assumed the debt? A. Yes, and it is in the deed also, see, it is an assumed agreement to pay.

"Q. In your conversation with Moorman did Mr. Moorman say, 'I assumed the debt'? A. Well, now, since I don't have the record I would just say yes.

"Q. Do you remember him saying those words, 'I assumed the indebtedness'? A. Well, I remember him telling me about trading houses with Sitton. I believe they traded houses. Sitton assumed his house and he assumed Sitton's house, yes.

"Q. But Mr. Moorman didn't tell you that he assumed Sitton's indebtedness? A. Yes.

"Q. He simply said they just traded houses? A. No, he assumed the debt, each one assumed the debt. See, that is one of our questions each man we call on we ask him that point. (Testimony 382-383)

* * * * *

"Q. *And you are able to remember that Mrs. Brown told you that she changed the name on the deed?* A. *Certainly did, I was surprised. Yes. See, I am a notary also.* (Testimony 385)

* * * * *

"Q. Then what did you tell her? A. I then introduced myself as I do and I showed her the deed and I asked her if she knew Mr. Moorman and then showed her the change.

"Q. Did she say whether or not she knew Mr. Moorman? A. Yes, she did. (Testimony 391)

* * * * *

"Q. What were her exact words? A. Well, I don't recall that other than she told me she changed them and then I asked her something if she was in the habit of that and she said something that was in the order of

'when neecssary,' that was not her exact words. I wrote that on the report. (Testimony 391)

* * * * *

"Q. And are you sure that she said she changed it or that it was changed in this office? A. *No, she said she changed it.*

"Q. She said she changed it? A. That's right.

"Q. What were the words when she said she changed it? A. I don't know, that goes back to the report, I don't have the report. You asked me a statement and she told me she changed it.

"Q. You are here testifying from your own personal knowledge? A. That's right.

"Q. *You say she said she changed it?* A. *That's right.*" (Testimony 392)

* * * * *

Cross Examination By Mr. Rugh: (Testimony 401)

* * * * *

"Q. Now, Mr. McMaster, you stated previously, I believe, that it is your testimony that Mrs. Brown told you that she had changed the deed? A. At Moorman's request, yes.

"Q. Did she say why she had done this if she did so do it. A. No, our conversation that day was very brief.

"Q. Did she say that anyone had asked her to do this or that she did it pursuant to anyone's instructions? A. As I recall, *Moorman told me he had her do it and she told me she did it.*" (Testimony 403)

Testimony of Walter J. Moorman

Direct Examination By Mr. Howell:

"Q. Tell me the name of the people you dealt with over at the Duckworth Agency. A. I recall Mr. Harry

Summer's name there; there may have been others, I don't remember any others.

"Q. You dealt primarily with Mr. Summer? A. Yes, most of my dealings with them were by telephone and on occasion I might not have known who I was speaking to. Mr. Summer handled the personal transactions. (Testimony 91)

* * * * *

"Q. When did you advise Mr. Summer that you wanted to have W. R. Trout buy the house? [The Sittons' G.I. home on Andover which Moorman was taking in trade] A. I don't recall the date.

"Q. Well, how long would it have been after this July 14th? [date of initial sales contract, P's. Ex. 1, A-40 infra] A. I don't remember that.

"Q. Would it have been before September 7th? [date of execution of petitioners' G.I. deed, A-40] A. I don't recall dates.

"Q. Would it have been after September the 7th? A. I don't recall these dates. (Testimony 97)

* * * * *

"Q. When did the Sittons move? A. I don't know.

"Q. The house [on Pleasant Drive which the Sittons were buying from Moorman] was vacant, I believe, is that right, sir? A. Yes.

"Q. Did you give them permission to move in before you got your money? A. I don't think—no, sir.

"Q. Then this call you say you made to the title company which you can't remember the name of was made after the Sittons had signed this September 7th deed, is that right, sir? * * * [objection overruled] A. I don't know when the call was made as to dates.

"Q. (By Mr. Howell) But you have testified that you imagined it was made after they moved, the Sittons

moved into your house? A. I don't know when they—I don't know when they moved. (Testimony 100-101)

* * * * *

"Q. When did it come to your attention, if it ever did, this loan was in trouble? MR. VANCE: We object. A. I don't remember exactly the fact I ever found it in trouble. * * * [objection overruled]

"Q. (By Mr. Howell) I will ask you, sir, if you received any telephone calls from Mrs. Sitton regarding this loan? A. I don't recall that.

"Q. No recollection whatsoever? A. Not as of the conversation, no, sir.

"Q. Well, do you recall the event? A. I don't really remember it, no, sir.

"Q. After you became advised that this loan was in trouble what did you do? A. In regard to what?

"Q. In regard to the Sittons' GI loan? A. Nothing.

"Q. Nothing at all? A. No, sir. (Testimony 106-107)

* * * * *

Deposition Testimony—Questions By Mr. Howell:

"Q. Whose idea was it to have the deed run straight from the Sittons to Trout? A. Mine.

"Q. When did you first get this idea? A. As soon as Mr. Trout indicated that he and his wife were interested and liked the house and would buy it. (Testimony 98, 99)

* * * * *

"Q. Was that before or after Mr. and Mrs. Sitton moved, * * * A. I don't remember that. *I imagine it was after,* but I am not certain. (Testimony 99)

* * * * *

"Q. Had you ever done any business with Harry Summer or the Duckworth Agency before? A. I don't think so.

"Q. Have you done any business with them since? A. Yes, sir, I have.

"Q. And what agent or associates of Duckworth Agency have you dealt with there primarily? A. The same gentlemen.

"Q. Harry Summer? A. Yes, sir. (Testimony 417)

* * * * *

"Q. When did you receive word that the Sittons' loan had gone through and that the real estate deal between you and them was to be closed? A. I don't recall.

"Q. Who did you get that advice from? A. I would assume Mr. Summer phoned me when it was completed with the Duckworth Agency. (Testimony 420-421)

* * * * *

"Q. When you went over to the title company to sign the papers, who did you see? A. I don't know that.

"Q. Was it a man or lady at the title company official [sic]? A. I think it was a man, I am not certain of that.

"Q. Did you get a check from the title company while you were there? A. I don't remember that.

"Q. Did you turn the keys to the property over to the Sittons in person? A. I don't remember.

"Q. When did you get the keys to the house on Andover? A. I don't remember that.

"Q. Did you ever get them? A. I don't know.

"Q. Did you ever tell Mr. Summer that you were going to have the deed made straight from the Sittons to Trout? A. I don't remember telling him that. (Testimony 421, 422)

* * * * *

"Q. You don't know whether you ever told Mr. Summer about the matter or not? A. That's correct. (Testimony 423)

* * * * *

"Q. Did you ever tell him? A. I don't recall telling him. (Testimony 423)

* * * * *

"Q. Mr. Moorman, I am going to hand you Plaintiffs' Exhibit 1 [the petitioners' G.I. deed; later re-marked as Ps' Ex. 3] and ask you if you have ever seen that instrument before? A. *I couldn't tell you if I have seen it or not.* (Testimony 424)

* * * * *

"Q. Do you know Mrs. Brown at the American Title Company office in Casa Linda. A. No, sir.

"Q. You did go to Casa Linda office, didn't you? A. I am not sure. I had in mind that I had gone over on Scyene Road.

"Q. Was Plaintiffs' Exhibit 1 shown to you on the day you signed the papers? A. I don't know that. (Testimony 424, 425)

* * * * *

"Q. How many times did you go to the office of American Title Company? Any office of American Title Company with reference to this Sitton deal? A. I don't remember that. (Testimony 425)

* * * * *

"Q. You made at least one telephone call over there? A. Yes, sir.

"Q. You are sure you made at least one? A. Yes, sir.

"Q. Do you know whether you made any more? A. I don't know.

"Q. Do you know whom you talked to at the title company on those telephone calls? A. No.

"Q. Man or woman? A. I don't know.

"Q. Did you ever call the Sittons and ask their permission to make a sale direct from them to Trout? A. No, sir. (Testimony 426)

* * * * *

"Q. Before you made a trade with Mr. Trout what did you do to find out whether or not he was financially responsible? A. Nothing. (Testimony 426-427)

* * * * *

"Q. Have you talked to Mrs. Sitton at any other times on the phone? A. It seems to me she called me one time, I am not certain. (Testimony 429)

* * * * *

"Q. *Did you ever tell Harry Summer what you were going to do with the Andover property after you took it in trade?* A. *I am sure Mr. Summer knows,* I don't remember specifically telling him, no, sir.

"Q. Where does W. R. Trout work now? A. He works for me. (Testimony 429)

* * * * *

"Q. Well, after you learned that he had moved out, what did you do to him? A. What did I do to him?

"Q. Yes. A. Nothing. What do you mean, what did I do to him? (Testimony 430)

* * * * *

"Q. Did you bawl him out? A. No, sir.

"Q. Have you ever tried to get him to pay up the deficiency on this GI loan? A. No, I haven't.

"Q. Did you ever ask him to? A. No.

"Q. Did you ever offer to take it out of his wages and work it out? A. No.

"Q. Did you ever offer to fire him unless he did something to get this thing straightened up? A. I did not.

"MR. HOWELL: That's all I have."

"Q. (By Mr. Newberry) *His financial condition is his business, isn't it?* THE WITNESS: *That's right.*

"MR. NEWBERRY: And it is not yours? THE WITNESS: That's correct. (Testimony 430-431)

Testimony of William Robert Trout

Direct Examination By Mr. Howell:

"Q. How long have you been employed by Moorman Brothers Plumbing Company? A. Eight years.

"Q. Still working there? A. Yes.

"Q. State the facts as to how you happened to move to this address on Andover. A. Well, I had spoke to Mr. Moorman about buying his house on Pleasant Drive and he taken this house on Andover in trade in it and he asked if I would be interested in buying it.

"Q. Did you buy it from Mr. Moorman? A. Yes, sir.

"Q. Did you go out and look at it first? A. Yes, sir.

"Q. State the facts as to who went along with you, if anyone. A. Well, the first time I went, Mr. Moorman and myself.

"Q. Was the house occupied or vacant on that trip? A. It was vacant.

"Q. How did you get the key? A. I went to Mr. Sitton's house myself and got it.

"Q. Where were the Sittons living at that time? A. On Pleasant Drive.

"Q. *That is the first time you saw the house on Andover, the Sittons had already moved?* A. *Yes, sir.* (Testimony 123, 124)

* * * * *

"Q. Going back to April of 1962, about four or five months before you moved into this house on Pleasant Drive,—excuse me, before you moved into this house on

Andover, Mr. Trout, did you apply for a loan, mortgage loan in your own name? A. I did.

"Q. What was the result of that application? A. It was turned down.

"Q. Mr. Moorman know of that? A. No, he didn't.

"Q. Did you advise him of that at the time you were dealing with him? A. No, I didn't.

"Q. On the Andover house? A. No, sir.

"Q. Did he ask you? A. No, sir.

"Q. Did he ask you anything about your credit or financial standing at the time he sold you the house on Andover? A. I don't remember. (Testimony 130)

* * * * *

"Q. (By Mr. Howell) When did Mr. Moorman make any mention to you about your moving out of the house? [objection overruled with qualification] A. It was about approximately two months, I guess, or maybe not quite so long.

"Q. About two months after you had moved out? A. Yes. (Testimony 133)

* * * * *

"Q. Did Mr. Moorman offer to help you through your financial difficulties so you could save the house? A. I didn't ask for help.

"Q. And he didn't offer. A. He didn't know I had moved until two months later.

"Q. Did Mr. Moorman tell you that you should pay any mortgage deficiencies or order you to? A. No. (Testimony 135)

Testimony of Kathryn H. Brown

Direct Examination By Mr. Howell:

"Q. Mrs. Brown, can you tell the jury how the name Walter Moorman got erased out of this deed and the

name of W. R. Trout and wife, Joanne Trout, got inserted? A. As far as knowing how it got changed, no. I understand Mr. Moorman called our office and asked us to—

THE COURT: Just a minute, what you know tell us, but not what you have heard. We want your knowledge.
THE WITNESS: I have no recollection of it being changed.

"Q. (By Mr. Howell) None whatsoever? A. None whatsoever.

"Q. Do you have any recollection of the Sittons coming in to sign? A. No, I do not. (Testimony 54)

* * * * *

"Q. (By Mr. Howell) Mrs. Brown, I will hand you what has been marked as Plaintiffs' Exhibit No. 5 and ask you to tell me what that is. A. It is a copy of the purchaser's statement wherein Sitton purchased from Moormans.

"Q. Sitton purchased from whom, ma'am? A. Moorman. (Testimony 58)

* * * * *

"Q. You have any copies of any statements from Moorman to Trout? A. I had no dealings with Mr. Trout.

"Q. Has he ever been in your office? A. No, he has not. (Testimony 59)

* * * * *

"Q. Mrs. Brown, can you explain why that the Sittons came in your office on September the 7th and signed the papers and you took their notarial acknowledgement on that date, why their deed did not get to the County Clerk's office until September 21st. A. Well, there could be several reasons. (Testimony 69)

* * * * *

"Q. (By Mr. Howell) Mrs. Brown, that deed was altered sometime between September the 7th and September the 21st when it finally got down here to the County Clerk's office for recording, isn't that correct? A. It was altered sometime prior to it having been signed on September 7th.

"Q. What do you base—how do you base your conclusion, Mrs. Brown? A. Deeds are not altered after they have been signed.

"Q. These nine erasures that were made were made before the Sittons signed, is that your testimony? A. Yes.

"Q. That is your direct recollection, you remember that, Mrs. Brown? A. I do not remember the Sittons being in the office but I do not change the instrument after it has been signed and acknowledged. (Testimony 70-71)

* * * * *

"Q. That is a mighty long delay getting an instrument down to the courthouse, isn't it, Mrs. Brown? A. No, it isn't long at all. (Testimony 71)

* * * * *

"Q. Mrs. Brown, you told me you don't remember the Sittons coming in at all. Do you recognize the Sittons? A. No, I do not. I do not remember ever seeing them before.

"Q. All right, ma'am. Do you directly recall Mr. Moorman coming into your office? A. I do not.

"Q. Do you recognize Mr. Moorman sitting here in the courtroom? A. As having seen him before, no. (Testimony 72-73)

* * * * *

"Q. *You have handled quite a bit of business with Mr. Summer, haven't you?* A. *Yes, I have.* (Testimony 73)

* * * * *

"Q. You are talking to him all the time, aren't you? A. On his deals, yes.

"Q. *And you were talking to him frequently during August and September, 1962?* A. *I feel that we were.* (Testimony 74)

* * * * *

"Q. Where did you get the additional information necessary to prepare Plaintiffs' Exhibit No. 3? [Petitioners' deed] A. We usually—in fact, always request the agent or whoever is handling the transaction to secure * * * something to work from in preparing the deed.

"Q. That would be Mr. Summer in this case, is that right? A. *Mr. Summer or some representative* of his.

"Q. And they sent you the additional information necessary for the preparation of this deed, Plaintiffs' Exhibit No. 3? A. Yes, we were furnished the title policy issued to Mr. Sitton." (Our emphasis) (Testimony 77-78)

* * * * *

"Q. (By Mr. Howell) Do you directly recall Mr. Moorman making such a telephone — — * * * [objection overruled] THE WITNESS: I do not remember handling this transaction at all. (Testimony 79)

* * * * *

"Q. Your testimony now is that you do not remember or recall any such transaction, is that right? A. No, I do not remember closing this particular transaction.

"Q. The statement you made in your affidavit is not correct? [Ps' Ex. 11, See Below] A. The statement I made in my affidavit I suppose you would say is from the way things would have to happen. (Testimony 82-83)

Deposition Testimony—Questions By Mr. Howell:

"Q. Do you know what secretary or typist made those erasures? A. No.

"Q. Were they made in the office out there at 114 Casa Linda Plaza? A. I do not know, looks like it was and I feel sure it must have been.

"Q. Is it your practice to take acknowledgment on instruments containing substantial erasures and retyping? A. Yes, as long as they signed it in your presence. (Testimony 414)

* * * * *

"Q. You erase things out and type in different provisions? A. Not after it is signed but before it is signed, yes.

"Q. It is a standard practice out there? A. It is a standard practice anywhere." (Testimony 414-415)

Mrs. Brown's Affidavit in Support of Motion for Summary Judgment

(Ps' Ex. 11, Exhibit Vol.)

"ON THIS the 18th day of AUGUST, 1964, personally appeared before me KATHERINE H. BROWN, who after first being duly sworn, deposed and stated as follows:

* * * * *

III

That at some time prior to the execution of the papers by RUSSELL H. SITTON and wife, BARBARA SITTON on September 7, 1962, MOORMAN called the

Casa Linda office of American Title Company of Dallas, and ordered the Deed from the SITTONS drawn so that the SITTON conveyance would be to W. R. TROUT. * * *

IV

* * * She does not know of any person who could have made any alterations in such Deed, since *the Deed was in her custody and possession* from the date of signing and notarizing such Deed until such Deed was forwarded to the main office of American Title Company of Dallas to be forwarded to the County Clerk to be placed of record."

Testimony of Harry Clifton Summer, Jr.,

Direct Examination By Mr. Howell:

"Q. Now, after the Sittons signed all five copies of this contract [Ps.' Ex. I, A-25]—they did sign that morning, is that right? A. * * * they signed five copies, yes. (Testimony 20)

* * * * *

"Q. You kept all five copies, is that right, sir? A. That's right. (Testimony 20)

* * * * *

"Q. The selling agent is who? A. Mrs. Gardner. (Testimony 21)

* * * * *

"Q. Is she going to be down here to testify? A. I don't know whether she is or not. (Testimony 21)

* * * * *

"Q. *The contract doesn't say a word about the GI loan at all, does it?* A. *It does not.* (Testimony 27)

* * * * *

"Q. And why didn't you, Mr. Summer, write in the contract here that Mr. Moorman was or was not to

assume the mortgage? A. *I have never written that in contracts.* (Testimony 28)

* * * * *

"Q. It is your considered testimony that you never put a provision in a contract spelling out definitely whether or not the buyer is going to assume the outstanding mortgage or take the house without assuming the mortgage? A. In a trade we write the contract just exactly like it is written.

"Q. Without providing or making any reference whatever to the fact one piece of property has got a mortgage on it? A. That would come up later.

"Q. Let the chips fall where they may? A. That would come up later in your negotiations. (Testimony 28, 29)

* * * * *

"A. *We close practically all of our deals with American Title.* * * * (Testimony 41)

Deposition Testimony—Questions By Mr. Howell:

"A. The only discussions that I had with Mrs. Brown regarding this deal was at the time the Veterans Administration man came to her office. (Testimony 441)

* * * * *

"A. She just notified me and told me that the Veterans Administration man had been to her office in regard to the Moorman and Sittons' deal, that's all." (Testimony 441)

Testimony of Mrs. Barbara Sitton

[Concerning events taking place soon after petitioners began receiving notices and demands on their G.I. loan]

Direct Examination By Mr. Howell:

"Q. And what did you do? A. I made some calls.

"Q. And who did you call? A. I first called Mr. Summer. (Testimony 191)

* * * * *

"Q. State the nature of your discussions with Mr. Summer. A. Yes, sir, I told Mr. Summer our GI loan was in trouble, that I gave him the whole nature of it, all the calls and letters and Mr. Summer told me there wasn't anything I could do about it, I had signed an open deed.

"Q. Did you know what an open deed was? A. No, sir.

"Q. Did you make any other telephone calls? A. Yes, sir.

"Q. Who did you call? A. I called Mr. Moorman. (Testimony 191, 192)

* * * * *

"Q. What were your discussions with Mr. Moorman? [objection overruled] A. I asked Mr. Moorman did he feel any responsibility towards this loan and he said that he did not. * * * (Testimony (192-193)

* * * * *

"Q. How did that conversation with Mr. Moorman end? A. Mr. Moorman told me I had signed an open deed and hung up on me.

"Q. Did you have any further conversations? A. Yes, I called Mrs. Brown about it.

"Q. And what did Mrs. Brown say? A. She said signing an open deed was a common procedure of the title company.

"Q. And what did she say with respect to your deed? A. She said there wasn't anything we could do about any of this.

"Q. Did she make any statement as to what kind of a deed you had signed? A. I don't think so, no. As I recall, Mrs. Brown said that I signed an open deed." (Testimony 194)

WARRANTY DEED — Vend Lien

The State of Texas, }
County of DALLAS }

242487..$2.00
Know All Men by These presents:

That BARBARA SITTON RUSSELL HAROLD SITTON and wife,

of the County of D A L L A S State of T E X A S for and in consideration of the sum of TEN AND NO/100 CASH and other good and valuable consideration

Dollars

to us in hand paid, and secured to be paid, by

W. R. TROUT and wife, JOANNE TROUT

as follows:

the receipt of which is hereby fully acknowledged; and

THE FURTHER CONSIDERATION of the ASSUMPTION OF AND AGREEMENT TO PAY by the Grantee herein of the unpaid balance due and owing on one certain note dated September 13, 1960, executed by Russell Harold Sitton and wife, Barbara Sitton, and payable to the order of T.J. BETTES COMPANY, as therein provided, in the original principal sum of $10,450.00; said note being secured by vendor's lien retained in deed of even date therewith and by deed of trust of even date therewith to John F. Austin, Jr., Trustee; and recorded in Deed of Trust Records of Dallas County, Texas;

(to which instruments reference is here made for all the terms, conditions and stipulations therein contained, which the Grantee herein agrees to perform;).

have Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey, unto the said

W. R. TROUT and wife, JOANNE TROUT,

of the County of D a l l a s State of T e x a s all that certain lot, tract or parcel of land situated in Dallas County, Texas and being

LOT 11 in BLOCK "O" of ROLLINGWOOD HILLS ADDITION, an Addition to the City of Mesquite, Texas, according to the Map thereof recorded in Volume 22, Page 229, of the Map Records of Dallas County, Texas.

GRANTEES herein assume payment of taxes for the yea r 1962.

This conveyance is made and accepted subject to the restrictive covenants imposed against the hereinabove described real property as the same appear of record in the office of the county clerk of Dallas County, Texas.

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging unto the said

W. R. TROUT and wife, JOANNE TROUT, their

heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to WARRANT AND FOREVER DEFEND, all and singular the said premises unto the said

W. R. TROUT and wife, JOANNE TROUT, their

heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the Vendor's Lien is retained against the above described property, premises and improvements, until the above described note , and all interest thereon, are fully paid according to its face and tenor, effect and reading, when this deed shall become absolute.

EXECUTED this 7th day of September , A.D. 19 62.

Russell Harold Sitton
Russell Harold Sitton

Barbara Sitton
Barbara Sitton

The State of Texas,
County of DALLAS } By This Agreement and Contract,

Walter J. Moorman & wife, hereinafter called Seller,
acting through the undersigned and duly authorized Agent, hereby sells and agrees to convey unto

Russell Harold Sitton & wife Barbara J. hereinafter called Purchaser,
the following described property: Lying and situated in the County of Dallas, State of Texas.

Being known as Lot 8 Block B/6185 Grove Mound Addition to the City of Dallas, Texas.
Also known as 2219 Pleasant Drive, Dallas, Texas

The purchase price is $ 11,500.00, payable as follows:
$ Cash (of which Purchaser has deposited with the undersigned Agent $
as part payment, receipt of which is hereby acknowledged by said Agent);

Purchaser agrees to make application for F.H.A. loan in amount 11,150.00, (30) years.
Balance as follows: Seller agrees to take in trade purchaser's home located at 331 Andover Drive, Mesquite, Texas, Allowing purchaser credit for all down payment and closing costs in amount not to exceed $700.00

The said executed note to be secured by Vendor's Lien and Deed of Trust with power of sale and with the usual covenants as to taxes, insurance, and default.

Seller agrees to furnish Title Policy to said property which shall be conveyed free and clear of any and all encumbrances except those named herein.

Purchaser agrees, within ten days from the receipt of said abstract, either to accept the title as shown by said abstract or to return it to the undersigned Agent with the written objections to the title. If said abstract is not returned to the Agent with the written objections noted within the time specified, it shall be construed as an acceptance of said title.

If any title objections are made, then the Seller or the Agent shall have a reasonable time to cure said objections and show good and marketable title. In the event of failure to furnish good and marketable title, the purchase money hereby receipted for is to be returned to Purchaser upon the cancellation and return of this contract; or, Purchaser may enforce specific performance of same.

Seller agrees, when title objections have been cured, to deliver a good and sufficient General Warranty Deed properly conveying said property to said Purchaser, and Purchaser agrees, when said Deed is presented, to pay the balance of the cash payment and execute the note and Deed of Trust herein provided for. Should the purchaser fail to consummate this contract as specified for any reason, except title defects, Seller shall have the right to retain said cash deposit as liquidated damages for the breach of this contract, and shall pay to Agent therefrom the usual commission, or, Seller may enforce specific performance of this contract.

Taxes for the current year, and current rents, insurance, interest (if any) are to be prorated to date of closing.

Possession on closing deed at Title Company.

Executed in triplicate this 14th day of July 19 62

This contract subject to the acceptance of Seller.

Accepted:

Walter Moorman
Seller.

By Thelma Gardner Mrs

Agent for Leonard Dashworth Agency

Russell H. Sitton
Barbara J. Sitton
Purchaser.

The Odee Company, Publishers, Dallas

Charge of the Court and Verdict of the Jury

[Note—numerous instructions and definitions are omitted]

You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

1. Do you find from a preponderance of the evidence that the names of Walter J. Moorman and wife, Jeirenne Moorman, as Grantees were erased from the deed involved in this case dated September 7, 1962, after it was signed by the Plaintiffs, Russell Harold Sitton and wife, Barbara Sitton? A. *Yes*

2. Do you find from a preponderance of the evidence that such alteration, if any, of the Plaintiffs' deed was done pursuant to any conspiracy? A civil conspiracy is a combination or agreement of two or more persons, by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. A. *Yes*

3. Find from a preponderance of the evidence which, if any, of the following named persons, if any, were parties to the conspiracy, if any, to alter the said deed (Plaintiffs' Exhibit No. 3), if you have so found.

KATHERINE H. BROWN	*Yes*
HARRY CLIFTON SUMMER, JR.	*Yes*
WALTER J. MOORMAN	*Yes*

4. Do you find from a preponderance of the evidence that at the time of the aforesaid conspiracy, if any, the Defendant Katherine H. Brown was employed by the Defendant American Title Company in a managerial capacity? A. *Yes*

5. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the defendant Katherine H. Brown was acting within the course and scope of her em-

ployment, if any, for Defendant American Title Company of Dallas? A. *Yes*

6. Do you find from a preponderance of the evidence that at the time of the aforesaid conspiracy, if any, the Defendant Harry Clifton Summer, Jr. was employed by the Pleasant Grove office of the Leonard Duckworth Agency in a managerial capacity? A. *Yes*

7. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the Defendant Harry Clifton Summer, Jr. was acting within the course and scope of his employment, if any, for the Pleasant Grove office of Leonard Duckworth Agency? A. *Yes*

8. Do you find from a preponderance of the evidence that in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, the Defendant Harry Clifton Summer, Jr. was engaged in the conduct of the real estate business? A. *Yes*

9. Do you find from a preponderance of the evidence that at the time of the said conspiracy, if any, the Defandant Lawyers Surety Corporation was acting as surety upon a Real Estate Brokers Bond of the Defendant Harry Clifton Summer, Jr.? A. *Yes*

10. Do you find from a preponderance of the evidence, that at the time of the aforesaid conspiracy, if any, the Defendant Leonard Cooksey Duckworth was engaged in the conduct of the real estate business under the name of Leonard Duckworth Agency? A. *Yes*

11. Do you find from a preponderance of the evidence that at the time of the said conspiracy, if any, the Defendant Trinity Universal Insurance Company was acting as surety upon a Real Estate Brokers Bond of the Defendant Leonard Cooksey Duckworth? A. *Yes*

12. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, acted with reckless disregard for the mental and physical health and welfare of the Plaintiff, Russell Harold Sitton? A. *Yes*

13. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of any mental or emotional pain and physical illness of Russell Harold Sitton occurring after July 1, 1963? A. *Yes*

14. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Russell Harold Sitton for his mental and physical pain and suffering, if any, after July 1, 1963, resulting from the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? A. $30,000

15. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of the Plaintiffs' deed (Plaintiff's Exhibit No. 3), if you have so found, acted with reckless disregard for the mental and physical health and welfare of the Plaintiff, Mrs. Barbara Sitton? A. *Yes*

16. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of any mental or emotional pain and physical illness of Mrs. Barbara Sitton occurring after July 1, 1963? A. *Yes*

17. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Mrs. Barbara Sitton for her

mental and physical pain and suffering, if any, after July 1, 1963, resulting from the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? A. $10,000.00

21. Find from a preponderance of the evidence which, if any, of the following named persons acted with malice in conspiring to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found? The term "malice" means ill will against a person, but in its legal sense means a wrongful act, done intentionally, without just cause or excuse.

KATHERINE H. BROWN	*Yes*
HARRY CLIFTON SUMMER, JR.	*Yes*
WALTER J. MOORMAN	*Yes*

22. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by the following named parties?

AMERICAN TITLE COMPANY	$20,000.00
KATHERINE H. BROWN	$ 3,500.00

23. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by the following named parties.

HARRY CLIFTON SUMMER, JR.	$ 3,500.00
LEONARD COOKSEY DUCKWORTH	$20,000.00

24. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be paid as exemplary damages (as that term is defined for you in this charge), if any, by Walter J. Moorman? A. $3,500.00

You are the sole judges of the facts proved; the credibility of the witnesses and of the weight and credit to be given to their testimony, but the law you will receive from the court,

which is herein given you and be governed thereby. (Pleadings 148-158)

Issues Requested by Plaintiff and Refused by Court

18. Do you find from a preponderance of the evidence that the parties, if any, to the aforesaid conspiracy, if any, in causing the alteration of Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, acted with reckless disregard for Russell Harold Sitton's G.I. loan obligation?

19. Do you find from a preponderance of the evidence that the aforesaid conspiracy, if any, to alter the Plaintiffs' deed (Plaintiffs' Exhibit No. 3), if you have so found, was a proximate cause of a foreclosure and resulting mortgage deficiency?

19A. What sum of money, if any, do you find from a preponderance of the evidence has the Plaintiff Russell Harold Sitton been required to pay upon the aforesaid mortgage deficiency, if any, up to this date?

20. What sum of money, if any, do you find from a preponderance of the evidence will the Plaintiff Russell Harold Sitton be reasonably and probably required to pay upon the aforesaid mortgage deficiency, if any, in the future? (Pleadings 213-214, 228)

Final Judgment

On the 16th day of November, 1964, there came on to be heard before the Court pursuant to notice the above numbered and entitled cause wherein RUSSELL H. SITTON and his wife BARBARA J. SITTON are plaintiffs and AMERICAN TITLE COMPANY OF DALLAS, a corporation, KATHERINE H. BROWN, JARVIS L. BROWN, LEONARD COOKSEY DUCKWORTH, doing business as LEONARD DUCKWORTH AGENCY, TRINITY UNIVERSAL INSURANCE COMPANY, a corporation, HARRY CLIFTON SUMMER, JR., LAWYERS SURETY

CORPORATION and MR. AND MRS. WALTER J. MOORMAN are each of them defendants. Came the parties except LEONARD COOKSEY DUCKWORTH in person and came each of the parties hereto by their attorneys. And the plaintiffs having filed their Second Amended Original Petition and the parties having announced ready, this cause came on for trial before a jury duly selected, sworn and empanelled. And the plaintiffs, having adduced their evidence and having duly rested, and the said defendants and each of them having dictated and filed their respective motions for a directed or instructed verdict and the Court having heard and considered the same outside the presence of the jury, the said motions were each overruled, to which said defendants each duly excepted. And the defendants having each duly adduced their evidence and having duly rested and the jury having been charged in accordance with the law, came the jury on the 20th day of November, 1964 and returned its SPECIAL ISSUE VERDICT into open Court which reads as follows, to-wit:

[Verdict Omitted—See Above]

The said SPECIAL ISSUE VERDICT being duly endorsed;

WE, THE JURY, HAVE ANSWERED THE ABOVE AND FOREGOING QUESTIONS AS IS HEREIN INDICATED AND HEREWITH RETURN SAME INTO COURT AS OUR VERDICT.

James W. Bush,
Foreman

And the said Special Issue Verdict, having been examined by the Court and having been found to be the unanimous verdict of the jury, was ordered received and filed in this cause.

And the Plaintiffs having filed their motion for judgment and the defendants having each filed their respective motions

for judgment non obstante veredicto and the Court having on the 14th day of January, 1965 heard and considered each of the said motions and having reconsidered the motions for directed or instructed verdict aforesaid and having examined the pleadings and the verdict of the jury and having heard the argument of the parties is of the opinion that the act of defendants in agreeing to alter and in altering the plaintiffs' deed after it was signed by the plaintiffs J.C.H./s/ RUSSELL HAROLD SITTON and BARBARA SITTON constituted damnum absque injuria and being of the opinion [sic] that defendants are entitled to judgment as a matter of law; now, WHEREFORE, premises considered, IT IS ORDERED, ADJUDGED and DECREED that the Defendants AMERICAN TITLE COMPANY OF DALLAS, a corporation, KATHERINE H. BROWN, JARVIS L. BROWN, LEONARD COOKSEY DUCKWORTH, doing business as LEONARD DUCKWORTH AGENCY, TRINITY UNIVERSAL INSURANCE COMPANY, a corporation, HARRY CLIFTON SUMMER, JR., LAWYERS SURETY CORPORATION and MR. AND MRS. WALTER J. MOORMAN have and recover judgment non obstante veredicto and that the Plaintiffs RUSSELL H. SITTON and wife, BARBARA J. SITTON take nothing of these defendants by their suit and that all costs incurred herein be taxed against the plaintiffs.

IT IS FURTHER ORDERED that this judgment is final and all relief not specifically allowed herein or heretofore, is hereby denied.

To which order and judgment of the Court the plaintiffs RUSSELL H. SITTON AND BARBARA J. SITTON duly excepted and in open court gave notice of appeal to the Court of Civil Appeals for the 5th Supreme Judicial District of Texas sitting at Dallas, Texas.

SIGNED this 21 day of January, 1965. (Pleadings 218-227)

PROCEEDINGS IN THE COURT OF CIVIL APPEALS

Appellants' Points of Error

(filed August 25, 1965)

Point One: The Trial Court erred in holding that there was no evidence to support the jury's finding that plaintiffs' deed was altered after the execution thereof.

Point Two: None of the appellees had any right to perform, or agree to perform, the criminal act of altering plaintiffs' deed after the execution thereof. The Trial Court erred in denying judgment for personal injuries and for foreclosure deficiencies paid and for foreclosure deficiencies payable and for exemplary damages, or for nominal damages and costs, or for any damages whatsoever, on grounds that the alteration after execution did not infringe any legally protected right of the appellants.

Point Three: The Trial Court erred in holding that plaintiffs' cause of action is within the statute of frauds.

Point Four: The Trial Court erred in holding that there was no evidence to support any of the jury's findings that plaintiffs' deed was altered as the result of a conspiracy between appellees Summer, Brown and Moorman, or any of them.

Point Five: The Trial Court erred in holding that as a matter of law the conduct of appellees Summer, Brown, and Moorman (or any of them) in agreeing to alter the plaintiffs' deed after its execution did not constitute a conspiracy.

Point Six: The Trial Court erred in holding that the plaintiffs' deed was drawn or altered (or both) by an independent practicing attorney. On the contrary, the acts of the attorney involved and the alleged secretary for the said attorney were the acts of the defendant title company as a matter of law.

Point Seven: The Trial Court erred in holding that the law of proximate cause was applicable to appellants' causes of action for personal injuries and for foreclosure deficiencies

paid and for foreclosure deficiencies payable and for exemplary damages or to appellants' causes of action for any of the said damages.

Point Eight: Alternatively, the Trial Court erred in holding that there was no evidence from which the jury could conclude that the conduct of the defendants in altering and agreeing to alter plaintiffs' deed after the execution thereof was a proximate cause of appellants' personal injuries or of the foreclosure deficiencies paid or of the foreclosure deficiencies payable or of any of the said damages.

Point Nine: The Trial Court erred in holding that there was no evidence to support any of the jury's findings to the effect that appellee Summer, Brown and Moorman (or any of them) acted with malice.

Point Ten: Appellants are further entitled to recover exemplary damages because they were injured by the unlawful conduct of appellee title company and its alter ego, appellee Brown, engaging in the unauthorized practice of law; Article 9.01 of the Insurance Code being unconstitutional and void insofar as it provides that title companies may supervise signing of legal instruments, deliver instruments and close deals.

Point Eleven: [Amended] The Trial Court erred in refusing appellants' requested issues 18, 19, 19-A, and 20 regarding the foreclosure deficiency and in refusing Barbara Sitton's testimony with respect to payments thereon.

Point Twelve: [Amended] Alternatively, the amount of the foreclosure deficiency is reasonably fixed and uncontroverted and the payments made thereon by appellants is also uncontroverted. The Trial Court erred in failing to render judgment for foreclosure deficiencies paid and payable and this Court should enter judgment therefor to avoid the burdens of time and expense involved in a remand.

Point Thirteen: The act of the Trial Court in rendering judgment non obstante veredicto on grounds other than those

specifically set forth in written motions filed with the Court and served upon appellants was contrary to the laws of procedure and constituted denial of due process of law and equal protection of the law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution.

Point Fourteen: Inasmuch as there is evidence of probative force to support the jury verdict, it would have constituted denial of due process of law and equal protection of law under Article One, Sections Fifteen and Nineteen of the Texas Constitution and Amendments Seven and Fourteen of the United States Constitution for the Trial Court to have rendered judgment non obstante veredicto on the grounds of "No Evidence."

[Note—Under points 13 and 14, argued together, the appellants incorporated 24 pages of fact statement by reference and presented six pages of argument containing fourteen citations of authority.]

(Appellants' Amended and Supplemental Original Brief 3-6; Appellants' Brief Amending Point of Error Number Eleven 2; Appellants' Brief Amending Point of Error Number Twelve 2)

Opinion of the Court

The appellants Russell H. Sitton and wife brought this suit for actual and exemplary damages alleging that they were the victims of an unlawful conspiracy between the defendants by which they both suffered extensive emotionally induced physical injuries, including the recurrence to Mr. Sitton of a childhood speech impediment; it being also alleged that among other ill effects Mrs. Sitton on one occasion became so emotionally overwrought by the situation that she fell from a moving automobile and sustained serious injuries. The defendants, who are the appellees here, were American Title Company of Dallas, Katherine H. Brown and husband, Jarvis L. Brown (Mrs. Brown being alleged

to have been a notary public and manager, vice-president and alter ego of American Title Company), the American Insurance Company, alleged to have been the surety on the bond given by Mrs. Brown as a notary public; Leonard Cooksey Duckworth, a licensed real estate broker trading as Leonard Duckworth Agency; Trinity Universal Insurance Company, surety on Duckworth's bond as real estate broker; Harry Clifton Summer, Jr., a licensed real estate broker and vice-president of Duckworth Agency; Lawyers Surety Corporation, surety on Summer's bond as real estate broker; and Mr. and Mrs. Walter J. Moorman.

The appellants alleged that they agreed to exchange their home at 331 Andover Drive in Mesquite, Texas, on which was a mortgage securing a first lien note in favor of T. J. Bettes Company, insured and guaranteed by the Veterans Administration, for a home owned by Walter J. Moorman; that the transaction was handled by Summer as sales manager of the Duckworth Agency; that pursuant to arrangements made by that agency appellants went to the offices of American Title Company of Dallas, met with its vice-president, Katherine Brown, and executed a deed conveying their home to Moorman, leaving the deed with Mrs. Brown for further handling; that this deed provided that as part of the consideration therefor the grantee assumed and agreed to pay the balance owing on appellants' mortgage note; that thereafter, in order to defeat Moorman's liability to assume appellants' note his name was erased after appellants had executed the deed, and the name of one Trout was substituted therefor. They further alleged that Trout failed to pay the monthly installments on the note and the property was foreclosed, resulting in a substantial deficiency which they were called upon by the Veterans Administration and T. J. Bettes Company to pay; that they, being of limited education, became very frightened and emotionally upset over these developments, the loss of Mr. Sitton's veteran's benefits and the numerous demands by mail and telephone that the deficiency be paid, all of which resulted in the physical in-

juries which, together with the deficiency they were called upon to pay, were made the basis of their claim for damages.

The court sustained American Insurance Company's motion for summary judgment and this was affirmed in Sitton v. American Ins. Co., 390 S.W. 2d 34.

The case was submitted to the jury on numerous special issues, all of which were answered favorably to appellants, after which the court rendered judgment *non obstante veredicto* that appellants take nothing. In appealing to this court they assign fourteen points of error.

The appellee Moorman has filed a motion to strike and disregard all of appellants' points of error as being multifarious, too general and insufficient under Rule 418, Vernon's T.R.C.P. While this motion points up numerous inadequacies and defects in appellants' points of error, after reading the statements and arguments thereunder, we are of the opinion that the points do inform the court and opposing counsel of the contentions made by appellants. The motion is therefore overruled. Fambrough v. Wagley, 140 Tex. 577, 169 S.W. 2d 478; Rule 422, T.R.C.P.

Facts

Appellants pitch their case entirely on their contention that all of the appellees (except the sureties on the notary's and real estate brokers' bonds) conspired to effect the alteration of their deed, after they had signed it, in order to deprive them of a valuable right, viz., the assumption by Moorman of the balance owing on their mortgage indebtedness, to their great loss and damage because, while Moorman was a man of financial means and would have paid the debt, the substitute grantee, Trout, was of such poor financial worth that he did not pay the debt and could not be compelled to do so.

The contract of exchange, signed by Moorman and the appellants, was dated July 14, 1962 and provided that Moorman and wife sold and agreed to convey unto appellants

their property known as 2219 Pleasant Drive, Dallas, Texas for a purchase price of $11,500, and that the Moormans would take in trade appellants' home located at 331 Andover Drive, Mesquite, Texas, allowing them credit "for all down payment and closing costs in amount not to exceed $700.00." This contract did not specify the balance owing by appellants on their property, and it did not provide that Moorman would assume or agree to pay any such balance. This exchange of properties was arranged for by the appellee Summer and another employee of the Duckworth Agency. Appellants testified that they were assured by these two employees and Mrs. Brown that Moorman would assume the debt.

Appellants went to the American Title Company's branch office, where they met with the appellee Mrs. Brown, vice-president and manager of the branch office of the title company, and where they signed the deed conveying their property to the appellee Moorman. The deed recited as part of the consideration the assumption of, and the agreement "by the Grantee herein" to pay, the unpaid balance owing on the note given by appellants, in the original principal sum of $10,450, when they purchased the property. This deed was dated September 7, 1962. At some subsequent time the names of Moorman and his wife were erased in the four places where they appeared in the deed and the names W. R. Trout and wife, Joanne Trout, substituted therefor. There is some dispute in the testimony as to whether this erasure and alteration were made prior or subsequent to the signatures by appellants to the deed, but the jury found, and for the purposes of this opinion we shall assume, that it was done subsequently. Moorman called someone at the office of the title company and requested that the names of W. R. Trout and his wife be inserted as the grantees in the deed in lieu of his and his wife's names. Trout was an employee of Moorman's plumbing company. This substitution was made by someone in the office of the title company. Trout

failed to pay the installment due on appellants' note on May 1, 1963 and appellants thereafter, beginning in June 1963, began receiving letters from the Veterans Administration demanding payment, threatening foreclosure and telling appellants that unless they made satisfactory arrangements for curing the default they would lose their property and their credit standing in the community would be seriously affected and, in addition, that if the property should sell at foreclosure sale for less than the debt, they might become indebted to the United States Government for the deficiency. The property was foreclosed on in February 1964, and the Veterans Administration notified appellant Sitton by letter dated June 5, 1964 that he owed an indebtedness of $524.95 plus 4% interest because of the foreclosure on the property. This letter also contained this statement:

> "You may request a waiver of this debt if you feel this obligation arose out of compelling reason without fault on your part, and collection of the indebtedness would work a severe hardship on you or your family."

Sitton did not reply to that letter, and about six weeks later received another letter from the Veterans Administration dated July 20, 1964, remarking that no reply had been received to its former letter and that the debt "must be paid," and stating that:

> "Government regulations place a definite limit upon the time during which the Veterans Administration may handle the collection of debts before the matter is referred to the General Accounting Office for action, including referral to the Department of Justice, if required."

These and other communications from the Veterans Administration and T. J. Bettes Company caused the great emotional upheaval which appellants say caused the physical impairments which form the basis of their demand for damages in this case. Mrs. Sitton first learned of the foreclosure about April 1, 1964, and when she told her husband of it she became "terribly upset" and fell out of the car door and sus-

tained rather serious injuries necessitating heavy medical expenses.

Opinion

Underlying this claim is the supposition by appellants that Moorman had in some way assumed their indebtedness and agreed to pay it, but that the defendants conspired together to nullify that obligation by causing the Moormans' names to be erased from the deed (it being provided in the deed that the named grantee assumed the debt and agreed to pay it) and substituting therefor the name of Trout, who had a very poor credit rating and who defaulted.

In the first place, we find no evidence in the record, and our attention is directed to none, that any of the appellees conspired with any of the others to do any act having the effect of nullifying any enforceable agreement on the part of Moorman to assume or pay the balance owing on appellants' indebtedness. Neither do we find evidence that any two or more of them engaged in concerted action to accomplish any such purpose or agreed to do so. For that reason alone, appellants' case falls, for they assert liability exclusively on the theory of conspiracy, and no conspiracy is shown to exist in the absence of proof that two or more persons have combined or agreed to accomplish by concerted action some unlawful purpose, or to accomplish some lawful purpose by unlawful means. Great Nat'l Life Ins. Co. v. Chapa, Tex. Sup. Ct., 1964, 377 S.W. 2d 632; Kingsbery v. Phillips Petroleum Co., Tex. Civ. App., 315 S.W. 2d 561, wr. ref. n.r.e.

When we examine the evidence to determine whether in fact Moorman made any such enforceable agreement, all we find to that effect is the testimony of one McMaster, a loan service representative of the Veterans Administration, who testified on cross-examination that during his investigation in November 1964 Moorman told him that he had assumed the Sittons' indebtedness in connection with their exchange of houses. While this may have constituted some evidence

of the fact as against Moorman, it was clearly hearsay as to the other alleged conspirators.

There is no direct evidence, as distinguished from the foregoing evidence of admissions against interest, that Moorman ever agreed to pay or assume the debt, or that he ever accepted a deed reciting any such obligation on his part. Appellants argue that Mrs. Brown, who was present when they signed the deed, accepted it as Moorman's agent. However, we find no evidence that Moorman ever authorized Mrs. Brown to act as his agent in that respect, or that he ratified anything she did purporting to act as his agent. In fact, we find no evidence that Moorman ever knew that the deed contained the provision for assumption of the debt by the grantee named therein. The substitution of Trout's name for his as grantee was done at his request while the deed was still in possession of the title company and before it had been delivered to anyone. Moreover, neither we nor the appellants have a right to assume that if Moorman's name had remained as grantee in the deed he would have accepted it. The written contract of exchange did not obligate him to do so, and appellants make no effort in this suit to enforce any such obligation. Their suit is strictly one in tort for damages.

Appellees contend that even if there had been a conspiracy between them to do the wrongful act of which they are accused, the emotional disturbances and resulting injuries could not have been anticipated or foreseen by them and are therefore too remote to form the basis of a recovery against them. In reply appellants say that, since this is not a negligence case, it was not necessary for them to prove proximate cause. They contend that this case is similar to, and should be governed by the principles of law announced in, cases like Thompson v. Hodges, Tex. Civ. App., 237 S.W. 2d 757, wr. ref. n.r.e., where the plaintiff, a railroad worker, was assaulted by his yard master; and Eastern Texas Electric Co. v. Baker, Tex. Civ. App., 238 S.W. 335, reversed

on other grounds 254 S.W. 933, where a colored passenger in a streetcar was kicked by the conductor in a ruction over seating arrangements. It was held in those and other cases that proximate cause is not an issue where the injury or damage is inflicted willfully or intentionally, for in such a case the actor is presumed to have intended the consequences. 40 Tex. Jur. 2d, NEGLIGENCE, § 17, p. 468.

The rule is well stated as follows in 25 C.J.S., DAMAGES, § 25b, p. 489:

> "In the case of willful torts the wrongdoer is responsible for *the direct and immediate consequences* regardless of whether they might have been contemplated, foreseen, or expected. Where the act is criminal or unlawful, the wrongdoer is held liable not only for immediate and natural consequences but for all such consequential injuries *as might reasonably be anticipated as the possible result of the wrongful act.*" [Italics by the Court]

But that is not to say that the perpetrator of a willful, wrongful, or even criminal act is liable in damages for every harm, no matter how remote, that might be related to the act complained of. A defendant in such a case cannot be held responsible for remote consequential injuries that could not have been reasonably anticipated as a probable result of his act.

Appellants cite a number of cases, beginning with Hill v. Kimball, 76 Tex. 210, 13 S.W. 59, to establish the now well settled rule that recovery may be had for fright, accompanied by physical injury, caused by the defendant's deliberate or negligent act; but in each of those cases it was also held that the complainant was under the necessity of showing that the defendant's act was a proximate cause of the fright and injury and that the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. One of the cases relied on by appellants is St. Louis & S.W. Ry. Co. of Texas v. Thompson, 102 Tex.

89, 113 S.W. 144, wherein Thompson sued several defendants as conspirators to recover damages, alleging they wrongfully and maliciously caused him to be expelled from his union, and wherein the Supreme Court held that if he could prove his expulsion was wrongful he would be entitled to recover against the conspirators "all damages which naturally flowed from such expulsion."

Appellants became interested in Moorman's house at 2219 Pleasant Drive in the summer of 1962 and the exchange was effected in September 1962. Apparently Trout paid the installments due on the Sittons' mortgage for several months, for the record is clear that the installments due each month until May 1, 1963 were paid. The letters which so upset the Sittons didn't start coming to them until some time in June 1963, after which four notices of foreclosure sales were posted to take place in October, November and December, 1963, with the foreclosure actually occurring in February 1964. At no time did appellants accept the Veterans Administration's invitation to request a waiver of the debt on the ground that the obligation for the deficiency arose without fault on their part and that its collection would work a severe hardship on them. Under these circumstances, can the appellants' injuries properly be said to have "naturally flowed" from the alteration of the deed? Were they "directly or immediately caused by the wrongful act"? We think each of these questions must be answered in the negative.

Appellants' Points of Error Nos. 1, 2, 3, 5, 6, 7, 8 and 9 assert error of the trial court in making certain "holdings" in the rendition of the judgment. We find no such "holdings" in the transcript; the judgment merely recites that the court is of the opinion that the defendants are entitled to judgment as a matter of law. It is our view that the evidence admits of no judgment other than that rendered, and that it must therefore be affirmed, regardless of the grounds or reasons the trial court may have thought controlling. 4 Tex. Jur.

2d, APPEAL and ERROR—CIVIL, p. 437, § 861; Fant v. Sullivan, Tex. Civ. App., 152 S.W. 515, 522, wr. ref.

Point No. 4 says the court erred in holding that there was no evidence to support any of the jury's findings that the deed in question was altered as a result of a conspiracy between Summer, Brown and Moorman, or any of them. This holding is implicit in the judgment rendered, and it should be clear from what we have said above that we agree that there was no such evidence.

The first nine points of error are overruled.

Their tenth point does not comply with Rule 418(b), T.R.C.P., in that it fails to direct our attention to any error relied on for reversal. It merely asserts that appellants are entitled to recover exemplary damages because they were injured by the unauthorized practice of law by the Title Company and Mrs. Brown; and then attacks the constitutionality of Article 9.01, Texas Insurance Code, insofar as it provides that title companies may supervise signing of legal instruments, deliver instruments and "close deals". By this point appellants attempt for the first time to raise an issue not mentioned in the pleadings or evidence in the trial court. Moreover, we see no merit in the point and overrule it.

By their Points of Error Nos. 11 and 12 appellants complain (11) of the refusal of the trial court to submit their requested Special Issues 18, 19, 19-A and 20 inquiring as to the amount of the deficiency due under the note in question after the foreclosure, and in rejecting Mrs. Sitton's testimony as to payments thereon, and (12), alternatively, of the failure of the trial court to render judgment for the foreclosure deficiency, the amount thereof being uncontroverted. Appellants having relied exclusively on the theory of conspiracy to establish any liability against appellees, and this court having held that there was no evidence of a conspiracy to alter the deed in question, or of alteration of the deed as a result of conspiracy, it follows that there was no reversible

error in rejecting either the special issues or the testimony, or in failing to render judgment for appellants for the foreclosure deficiency. Points 11 and 12 are overruled.

Like their tenth point, appellants' Points of Error 13 and 14 fail to complain of any specific error of the trial court. They merely assert that the judgment *non obstante veredicto*, having been rendered on grounds other than those specified in the motions therefor, and in the face of evidence of probative force supporting the verdict, was contrary to the laws of procedure and denied appellants due process and the equal protection of law guaranteed to them by Article 1, §§ 15 and 19, of the Texas Constitution and the Seventh and Fourteenth Amendments to the United States Constitution. The argument under these points does no more than trace the evolution of the jury system from its nebulous origins in the hazy mists of antiquity, extol its many virtues and accuse the trial court generally of substituting its fact determination for that of the jury. Our attention is directed to no specific evidence supporting any part of the verdict; nor is it demonstrated how appellants' said constitutional rights were violated. Our examination of the record discloses to us no such evidence and no such violation. Therefore, we say again that the motions for directed verdict should have been sustained and that the judgment *n.o.v.* was correct. Rule 301, T.R.C.P.; Bolin v. Pacific Finance Co., Tex. Civ. App., 278 S.W. 2d 879, no wr. hist. Points 13 and 14 are overruled.

All of the appellees except Lawyers Surety Corporation have filed numerous cross points which are entitled to, and have received, our careful attention. However, being of the opinion that a recitation of the testimony, special issues and jury argument complained of, together with a full discussion of our views thereon, would add nothing to an understanding of this case or be of "importance to the jurisprudence of the State," Rule 452, T.R.C.P., we merely indicate below our decision on each of these cross points.

Cross points of appellees American Title Company of Dallas, Katherine and Jarvis Brown:

Nos. 1, 6, 7, 8 and 9 are overruled.

Nos. 2, 3, 4 and 5 are sustained.

No. 10, being submitted conditionally on reversal, is not considered.

Cross points of appellees Duckworth, Summer and Trinity Universal Insurance Company:

Nos. 1, 2, 3, 4, 5, 6, 7 and 8 are overruled.

Nos. 9 and 10, being submitted conditionally on reversal, are not considered.

Cross points of appellee Moorman:

Nos. 1, 2, 3, 4, 7 and 10 are overruled.

Nos. 5, 6, 8 and 9 are sustained.

As we read this record, the trial court gave appellants every reasonable opportunity to make out a case against the appellees. We agree with the trial court that they failed to do so. The judgment is therefore AFFIRMED.

DELIVERED: October 29, 1965 (396 S.W. 2d 899-906)

American Cross-Points 2, 3, 4, 5 & 10
(Filed September 21, 1965)

Two The trial court improperly submitted Special Issues No. 1, and No. 2 in that these issues were not raised by the evidence and were submitted in an improper order and in that Special Issue No. 2 was duplicitous.

Three The court erred in submitting Special Issue No. 3, 4, and 5, for the reason that there was no evidence to warrant the submission of such issues.

Four It was error to submit Special Issues No. 4 and No. 5 for no evidence having been offered on the question of con-

spiracy, inquires as to Katherine Brown's status were not relevant to any issues raised.

Five The Court erred in submitting Special Issues Nos. 12, 13, 14, 15, 16, 17, 21, 22, and 24.

Ten The damage issues as answered by the jury were grossly excessive and should the Court reverse and render, it should order remittitur. (Brief for American, et al., 47-49)

Duckworth Cross-Points 9 & 10
(Filed September 24, 1965)

Nine The excessive award of damages and the verdict of the jury reflects the passion and prejudice which prevented the jury from considering the issues on their merits. For this reason, should this court find that the trial court erred in entering judgment *non obstante veredicto* this court should remand this cause to the trial court for new trial.

Ten In the alternative, should this court find that the trial court erred in entering a judgment for the Appellees *non obstante veredicto*, it should order a remittitur of the excessive damages awarded by the verdict of the jury. (Original Brief of Duckworth, et al. 8)

Moorman Cross-Points 5, 6, 8 & 9
(Filed September 29, 1965)

Five The trial court erred in the submission of special issue number twelve to the jury for the reasons that there was no evidence of probative force to support the submission of said issue, and as submitted it constituted a comment on the weight of the evidence and further contained a phrase improperly defined by the court.

Six The trial court erred in its submission of special issues numbered 13, 14, 15, 16, and 17 for the reason that there was no competent evidence of probative force to support the submission of said issues.

Eight The trial court erred in its submission of special issue number 21, for the reason that there was no competent evi-

dence of probative force to support the submission of said issue.

Nine The trial court erred in its submission of special issue number 24 for the reason that there was no competent evidence of probative force to support the submission of said issue. (Brief of Moorman, 10-11)

PROCEEDINGS IN THE SUPREME COURT OF TEXAS

Application for Writ of Error

(Filed Ct. Civ. App., January 3, 1966, Supreme Ct. Tex., January 5, 1966)

Order

March 9, 1966 Application of petitioners for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no erorr requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Russell H. Sitton and wife, Barbara J. Sitton pay all costs incurred on this application. (Transcript, Supreme Ct. of Tex.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The United States Constitution, Article III, Section 2. The judicial Power shall extend * * * to Controversies to which the United States shall be a Party; * * *

The United States Constitution, Amendment Seven. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C., § 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

38 U.S.C., § 1803(c)(1)(With Amendments to September 13, 1960--Date of Russell Sitton Loan) Loans guaranteed or insured under this chapter shall be payable upon such terms and conditions as may be agreed upon by the parties thereto, subject to the provisions of this chapter and regulations of the Administrator issued pursuant to this chapter, and shall bear interest not in excess of such rate as the Administrator with the approval of the Secretary of the Treasury, may from time to time find the loan market demands except that such rate shall in no event exceed 5¼ per centum per annum.

38 U.S.C., § 1820(a)(4). Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter, the Administrator may—

(4) pay, compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption; and the authority to waive or release claims may include partial or total waiver of payment by the veteran, or his spouse, following default and loss of the property where the Administrator determines that the default arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship upon the veteran.

Texas Constitution, Article I, Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. * * *

Rule 290, Tex. Rules Civ. Proc. * * * A special verdict shall, as between the parties, be conclusive as to the facts found.

Rule 291, Tex. Rules Civ. Proc. No special form of verdict is required, and the judgment shall not be arrested or reversed for mere want of form therein if there has been substantial compliance with the requirments of the law in rendering a verdict. No verdict shall be rendered in any cause except upon the concurrence of all members of the jury trying the case.

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1094

RUSSELL HAROLD SITTON AND BARBARA SITTON,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL,
Respondents.

Answer to Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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Answer to Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Respondents, American Title Company of Dallas, Katherine H. Brown and husband Jarvis Brown, Leonard Duckworth, Leonard C. Duckworth Agency, Harry Clifton Summer, Jr., Mr. and Mrs. Walter J. Moorman, American Insurance Company, Trinity Universal Insurance Company, and Lawyers Surety Corporation would respectfully show unto the Court that the Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings should be in all things overruled and further that the Petition for Writ of Certiorari in the above cause should be denied.

ANSWER TO MOTION TO DEFER CERTIORARI AND REFER CASE TO THE FIFTH CIRCUIT FOR ADDITIONAL FINDINGS

The Respondents named hereinabove submit that Petitioners' Motion to Refer the Case to the Fifth Circuit for Additional Findings is without merit and is without substantiation in the rules or law.

Petitioners request this Court to return the case to the lower court for an examination of the facts. The cases Petitioners cite at page 5 of their Motion are not in point and are clearly distinguishable in their holdings from the relief requested by Petitioners herein. Likewise, the citation to Stern & Gressman, Supreme Court Practice, at page 26 is quoted out of context and not in point.

Therefore, Petitioners' Motion should be in all things overruled.

COUNTERPOINTS TO QUESTIONS PRESENTED BY PETITIONERS

COUNTERPOINT ONE
(Replying to Petitioners' Question One)

Petitioners' Question One presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT TWO
(Replying to Petitioners' Question Two)

Petitioners, in Question Two, raise no question within the jurisdiction of this Court, in that the Courts below did not hold that where the United States is a party to a case in the federal court and one of the parties invokes the previous judgment of a state court that the federal

court is without jurisdiction to hear a claim that the state court proceedings violate the Seventh and Fourteenth Amendments.

COUNTERPOINT THREE

(Replying to Petitioners' Question Three)

Petitioners' Question Three presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT FOUR

(Replying to Petitioners' Question Three)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT FIVE

(Replying to Petitioners' Question Three)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in the State Court.

COUNTERPOINT SIX

(Replying to Petitioners' Question Four)

Petitioners raise no constitutional question in their Question Number Four, in that such question inquires only whether the evidence in the cause in the State Court raises a fact issue.

COUNTERPOINT SEVEN

(Replying to Petitioners' Question Five)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Five, in that such question simply requests the Court to search the record in the State Court to see whether there was an absence of evidence to support the jury verdict, and if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

COUNTERPOINT EIGHT

(Replying to Petitioners' Question Six)

Petitioners, in their Question Number Six, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoice the hardship provision of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in the cause.

COUNTERPOINT NINE

(Replying to Petitioners' Question Eight)

Petitioners' Question Number Eight presents no question for adjudication within the jurisdiction of this Court, in that the Court of Appeals did not pass on the question of limitations and no error is shown.

STATEMENT OF THE CASE

The original suit in the United States District Court was instituted by the Respondent United States of America against Petitioners for the recovery of a deficiency resulting from the foreclosure of a mortgage guaranteed by the Vet-

erans Administration. Petitioners then instituted a third party complaint against these Respondents as third party defendants. Petitioners alleged in this third party complaint that Respondents Duckworth, Summer, Katherine Brown and Walter Moorman conspired together to alter a warranty deed to substitute a grantee in said deed in order to remove Respondent Moorman as an assumptor of a mortgage. Petitioners further alleged that as a result of this alleged conspiracy they sustained actual and exemplary damages totalling $90,000.00.

Petitioners further alleged that the exact same cause of action as alleged in the third party complaint had been previously alleged and tried in a State District Court to a jury. The result of this trial in the State District Court was that said Court entered a judgment on January 21, 1965, decreeing that Petitioners take nothing by this cause of action against these Respondents. Petitioners then appealed the State District Court judgment to the applicable Court of Appeals for the State of Texas. The Texas Court of Appeals affirmed the State District Court judgment. Petitioners sued out a writ of error to the Supreme Court of the State of Texas, which court refused to grant Petitioners' application for writ of error.

Thereafter, Respondents applied for a Writ of Certiorari to this Honorable Court, which was denied.

In the third party complaint filed with the Federal District Court, Petitioners prayed for relief on two principal grounds. The first, that the Federal District Court should

"render such judgment against third party defendants as the State Court should have rendered"; and second, in the alternative that the Federal District Court should conduct a plenary trial and render judgment for Petitioners for the claimed actual and exemplary damages.

Respondents denied the allegations of the third party complaint, and pleaded the specific affirmative defenses of estoppel by judgment, res judicata, and the Texas two year statute of limitations. These defenses as to the cause of action pleaded by Petitioners and their prayer for a plenary trial on the merits. As to Petitioners pleading and prayer for the Federal District Court to render such judgment as the State Court should have rendered, Respondents filed their Motion to Dismiss for Lack of Jurisdiction.

Thereafter, all parties to the pending litigation filed Motions for Summary Judgment. Upon hearing, the Federal District Court entered its judgment sustaining the Motion of the United States for deficiency; further, its judgment overruling the motion for summary judgment of Petitioners; and its judgment that these Respondents' Motion to Dismiss for Lack of Jurisdiction be sustained as to Petitioners' prayer for the District Court to render the judgment that the State Court should have rendered, and that Respondents' Motion for Summary Judgment be sustained as to Petitioners' pleading and prayer for a plenary trial on the merits.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court.

COUNTERPOINT ONE — (Restated)

Petitioners' Question One presents no question for adjudication within the jurisdiction of this Court.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT ONE

Question One as put by Petitioners must be answered in the negative and it affords no ground for granting the Writ of Certiorari. Petitioners raised the alleged federal questions at the first opportunity during the proceedings in the State Courts. They were denied at all levels of appeal during the proceedings. The claims Petitioners alleged in the Federal District Court were the same as in the state court litigation, which Petitioners concede in their application for Writ of Certiorari. Petitioners had full opportunity to be heard and were heard with respect to their claim of denial of due process. The Federal District Court was correct in applying the doctrine of res judicata. This, even though the state court judgment might be erroneous. *Rooker v. Fidelity Trust;* 263 U.S. 412 (1923); *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316 (1927); and *Angel v. Bullington,* 330 U.S. 183 (1946). The Petitioners asserted their alleged rights in the state courts through the highest tribunal available to them, including this Honorable Court. They were unsuccessful. They cannot begin all over again in an action involving the same issues before another forum in the same state. *Angel v. Bullington, supra.*

COUNTERPOINT TWO — (Restated)

Petitioners, in Question Two, raise no question within the jurisdiction of this Court, in that the Courts below did not hold that where the United States is a party to a case in the federal court and one of the parties invokes the previous judgment of a state court that the federal court is without jurisdiction to hear a claim that the state court proceedings violate the Seventh and Fourteenth Amendments.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT TWO

It is the position of these Respondents that Petitioners misconstrue the basic nature of the "jurisdiction" of the Federal District Court. It is true that 28 U.S.C. 1345 provides that the district court has original jurisdiction of all civil actions where the United States is a party. Only by construction is this section held to confer jurisdiction over a cross claim ancillary to the principal claim. *United States v. Manufacturers Hanover Trust Co.* (D.C. N.Y. 1964) 231 Fed. Supp. 160. The district court, by this construction, may acquire jurisdiction over the person of the Respondents (as third party defendants); but the court must then look to the pleadings to determine whether or not a justiciable controversy is presented. *Resolute Insurance Co. v. State of North Carolina,* (4th Cir., 1968) 397 F. 2d 586.

Upon resort to the pleadings of Petitioners in their third party complaint, their argument fails upon two separate grounds. Petitioners pleaded a cause of action that had

previously been litigated in the state courts, the outcome of which was adverse to Petitioners. They asked the district court to "render such judgment against third party defendants (Respondents herein) as the state court should have rendered." This complaint and prayer constitutes nothing more than a request for appellate review.

Cases of this nature have been before the federal courts many times. They have been uniformly dismissed for lack of jurisdiction. The leading case is *Rooker v. Fidelity Trust Co.* 263 U.S. 412 (1923). This opinion holds that a district court does not have jurisdiction of a case that has been previously litigated in a state court. It points out that a district court does not have appellate jurisdiction and cannot entertain such a case even if the constitutional irregularities alleged to exist did in fact exist. See also *Williams v. Tooke,* (5th Cir., 1940) 108 F. 2d 758; *Patterson v. City of Newport News, Va.,* (4th Cir., 1966) 364 F. 2d 816; and *Resolute Insurance Co. v. State of North Carolina,* supra.

The second ground involved is Petitioners' pleading and prayer for a plenary trial on the merits. This pleading and prayer is subject to the plea of res judicata raised by Respondents. Petitioners concede the cause of action and the parties to be the same as in the state court proceeding. Under the state of the record, the district court was correct in applying res judicata as a bar to Petitioners' pleading and prayer for a plenary trial.

Petitioners complain that the district court dismissed the cause for want of federal jurisdiction. It is submitted that

this is a misconstruction of the judgment entered by the court with respect to the entire action as it existed. The district court granted a summary judgment to the United States against Petitioners as to the merits of the cause of action of the government against Petitioners. The district court dismissed the complaint of Petitioners against the Respondents insofar as the same prayed for appellate review by the district court; and the district court granted Respondents a take nothing judgment as to Petitioners' pleading and prayer for a plenary trial upon the ground of res judicata, as raised by Respondents in their answers and Motions for Summary Judgment.

The question does not afford a reason for granting the writ.

COUNTERPOINTS THREE, FOUR AND FIVE — (Restated)

COUNTERPOINT THREE — (Restated)

Petitioners' Question Three presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT FOUR — (Restated)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT FIVE — (Restated)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states

observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in the State Court.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINTS THREE, FOUR AND FIVE

Petitioner presents no issue in Question Three or the argument thereunder within the jurisdiction of this Honorable Court. Question Three, as presented, is merely a rhetorical statement; it amounts only to a request for an advisory opinion. Petitioner makes no showing that this Court's answer to Question Three would either grant or deny them relief, for they make no showing that even if the Second Clause of the Seventh Amendment does apply to the state courts, the rights guaranteed thereunder were not extended to Petitioners. Petitioners make no showing or argument that they did not receive a trial by jury in accordance with the stipulations of the Seventh Amendment to the United States Constitution.

Your Respondents would show, however, that the Second Clause of the Seventh Amendment does not apply to proceedings in state courts. Petitioners cite numerous cases holding that the First Clause of the Seventh Amendment does not apply to the states through the due process clause of the Fourteenth Amendment. Most of the cases cited by Petitioners hold either directly or by necessary implication, that the Second Clause of the Seventh Amendment does not apply to the states either. Because it is not mandatory for the states to provide trial by jury in civil cases, it must be held that if a state does provide trial by jury, it may

also provide reasonable rules governing the process and procedure of such trial. The cases upholding this point are legion. See, for example *Fay v. People of New York*, 332 U.S. 261 (1947). In that case, this Court stated:

> "(I)t steadily has been ruled that the commandments of the Sixth and Seventh Amendments would require jury trial in criminal and certain civil cases are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This Court has ruled that consistently with those amendments, trial by jury may be modified by a state or abolished altogether.' *Palko v. State of Connecticut*, 302 U.S. 319 and cases there cited."

Conceivably, the trial process provided by a state court could violate due process of law. Such is not the circumstance as exists with the state court in this instance, nor is it the proposition raised by Petitioners. Petitioners would have this Court hold that all judgments non obstante veredicto are ab initio unconstitutional.

Such a holding would require the Courts and legislatures of every state in the union to alter their rules of judicial procedure. Moreover, such a holding would violate Rule 50b of the Federal Rules of Civil Procedure. Rule 301 of the Texas Rules of Civil Procedure is similar to Rule 50b of the Federal Rules of Civil Procedure. Rule 301 provides that judgment non obstante veredicto may be granted only if a directed verdict would have been proper. This rule has been construed much the same as Rule 50b, in that judgment non obstante veredicto may be entered only when,

for the facts, there is no evidence of probative force in favor of the judgment. Under Rule 301, judgment non obstante veredicto may be entered only when, from the evidence, reasonable minds could not differ on the result. That rule was observed and followed by the state court in the case. The state trial judge, the Honorable Court of Appeals for the Fifth Judicial District of Texas, and the Honorable Supreme Court of Texas, by its refusal to hear Petitioners' Writ of Error, have held that there was no evidence to support the verdict that was rendered upon the trial of this cause in the state court. The Petitioners produced no evidence of any probative force to sustain the allegation of their petition.

COUNTERPOINTS SIX AND SEVEN — (Restated)

COUNTERPOINT SIX — (Restated)

Petitioners raise no constitutional question in their Question Number Four, in that such question inquires only whether the evidence in the cause in the State Court raises a fact issue.

COUNTERPOINT SEVEN — (Restated)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Five, in that such question simply requests the Court to search the record in the State Court to see whether there was an absence of evidence to support the jury verdict, and if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINTS SIX AND SEVEN

Petitioners' Questions Four and Five simply ask the Court to weigh the evidence in this case. It has been held in the following cases that a Writ of Certiorari will not be granted to review evidence: *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175 (1938), 305 U.S. 124 (1938); *U. S. v. Johnston*, 268 U.S. 220 (1925). Thus, this Honorable Court would not grant a Writ of Certiorari to review a decree on the ground that the evidence was not sufficient to establish actual dedication of Petitioners' property to public use. *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508 (1924).

While this Court can review a decision of a state court on a question pertaining to evidence where a federal question is otherwise involved, it does not have jurisdiction to determine sufficiency of evidence absent the federal question. *Whitney v. People of State of California*, 274 U.S. 357 (1927), *Van Oster v. State of Kansas*, 272 U.S. 465 (1926).

Where the lower court has found that there was no evidence on a certain issue, the rule is that if, in fact, there is no such evidence, or if the evidence is conflicting, the Supreme Court of the United States can inquire no further. Only if the uncontroverted evidence affirmatively establishes the facts contrary to the finding can this Court ignore that finding. *Baltimore and O.S.W.R. Co. v. Burtch*, 263 U.S. 540, (1924).

COUNTERPOINT EIGHT — (Restated)

Petitioners, in their Question Number Six, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoice the hardship provision of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in the cause.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT EIGHT

The Texas Court of Civil Appeals did not hold that a failure to seek relief under the hardship provisions of the applicable statute barred a veteran from seeking relief from third parties. The Court, in referring to the letters from the Veteran's Administration concerning a waiver of Petitioners' indebtedness was dealing with the question of causation. The Petitioners, having alleged that their injuries flowed from the act of the alteration of the deed, the Court of Civil Appeals was simply pointing out that the harassment which had occurred by the Veteran's Administration might not have occurred had Petitioners sought the remedy available to them. So the Court said, "Under these circumstances can the Appellants' injuries properly be said to have 'naturally flowed' from the alteration of the deed? Were they 'directly or immediately caused by the wrongful act'? We think each of these questions must be answered in the negative."

Thus, there was no holding that failure to apply for relief to the Veteran's Administration barred an action against

the third party. All the Court was saying was that in proving causation Petitioners had to show that the alleged injuries sustained by them were direct and immediate consequences of the act of the Respondents. And the Court was pointing out that the chain of causation was broken. Consequently, a construction of the statute in question was not necessary to a decision in the cause.

COUNTERPOINT NINE — (Restated)

Petitioners' Question Number Eight presents no question for adjudication within the jurisdiction of this Court, in that the Court of Appeals did not pass on the question of limitations and no error is shown.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT NINE

A careful reading of the opinion by the Court of Appeals reveals that it made no holding with regard to Respondents' plea of the statute of limitations. Petitioners concede that this is so (page 46, Petition for Writ of Certiorari). Such being the case, no harm or error is shown, there is nothing under this question for this Court to consider.

These Respondents have not answered or argued Petitioners' Question Seven as the same pertains only to the main action between the United States and Petitioners.

CONCLUSION

WHEREFORE, these Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1094

RUSSELL HAROLD SITTON and BARBARA SITTON,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON "MOTION TO DEFER CERTIORARI AND REFER CASE TO THE FIFTH CIRCUIT FOR ADDITIONAL FINDINGS" AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-11 to A-20) is reported at 413 F. 2d 1386. The judgment of the district court (Pet. App. A-8 to A-10) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1969, and a petition for rehearing was

denied on October 22, 1969. The petition for a writ of certiorari was filed on January 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judgment recovered by the United States on account of payments under a Veterans Administration home loan guaranty bears interest at the rate established by the state for judgments, or at the rate established by the Administration for the guaranteed loan.

We do not discuss the other questions raised in the petition, since they do not concern the United States.

STATUTES INVOLVED

28 U.S.C. 1961 provides in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

38 U.S.C. 1803(c)(1) provides in relevant part:

> Loans guaranteed or insured under this chapter shall be payable upon such terms and conditions as may be agreed upon by the parties thereto, subject to the provisions of this chapter and regulations of the Administrator [of the Veterans Administration] issued pursuant to this chapter, and shall bear interest not in excess of such rate as the Administrator * * * may from time to time find the loan market demands; * * *.

STATEMENT

Petitioners purchased a home in Mesquite, Texas with a loan partially guaranteed by the Veterans Administration. In 1962 they agreed to trade it for another house, with the grantee to assume the balance still due. Subsequently the loan became delinquent, foreclosure ensued, and the Veterans Administration as guarantor paid the deficiency (Pet. App. A-11 - A-12). The Veterans Administration then wrote to petitioners informing them that they must pay the deficiency with 4% interest, but that they could request a waiver if the debt arose without their fault and payment would impose a hardship on the family (Pet. App. A-54).

Petitioners did not seek a waiver, but instead filed in a Texas state court an action to which the United States was not a party, asserting that their original grantee had conspired with the title insurance company, real estate agent and others to erase their deed and substitute as grantee a poor credit risk, without petitioners' knowledge. They sought actual and punitive damages for emotionally induced physical injuries which resulted from efforts to collect the balance due from them after the substituted grantee defaulted. The jury returned a verdict in petitioners' favor for $90,500, finding specially that the deed was altered pursuant to a conspiracy. However, the trial court entered judgment for the defendants notwithstanding the verdict, on the ground that the defendants were entitled to judgment as a matter of law (Pet. App. A-41 - A-47). The Texas Court of Civil Appeals

affirmed, finding that petitioners had not adduced evidence sufficient as a matter of law to show a conspiracy, and the Supreme Court of Texas denied a writ of error (Pet. App. A-48 - A-63). Petitioners then sought certiorari in this court, asserting that the trial court's action in entering judgment n.o.v. violated the 7th Amendment and thus denied them the due process of law guaranteed them by the 14th Amendment. Certiorari was denied. *Sitton* v. *American Title Co. of Dallas*, 385 U.S. 975, rehearing denied, 385 U.S. 1033.

There the matter rested until the Veterans Administration brought suit against petitioners in federal district court to recover the $488.66 due on the deficiency. Petitioners then made third-party claims against all the defendants in the state court action, asking the district court to enter judgment for petitioners on the original jury verdict or, alternatively, to grant them a new jury trial in federal court (Pet. 12). The third-party defendants answered, denying liability and asserting the state court judgment as res judicata. The district court entered summary judgment for the United States, with interest at 6% from the date of judgment, and dismissed the third-party complaint (Pet. App. A-8 - A-10).

The Court of Appeals for the Fifth Circuit affirmed the judgment against petitioner Russell Sitton, including interest at a rate of 6%, but reversed as to his wife because it considered her protected by the Texas law of coverture. The Court also affirmed the dismissal of the third-party action.

ARGUMENT

1. Petitioners do not contest the entry of summary judgment in favor of the United States on the mortgage deficiency, except to attack the rate of post-judgment interest set by the Court. In this connection they contend that 38 U.S.C. 1803(c)(1), which authorizes the Veterans Administrator to set interest rates on home loans, was intended by Congress to require that the same rate of interest be set by courts on deficiency judgments entered against veterans who default on their loans. There is nothing in this statute or its legislative history to show any such intent; to the contrary, as the Fifth Circuit pointed out, post-judgment interest in federal courts is governed by 28 U.S.C. 1961, which specifically provides that the rate shall be the same as that allowed in the relevant state court. Here that rate was 6% per annum. Vernon's Tex. Civ. Stat., Title 79, Art. 5072. Plainly the grant of a petition for certiorari to review the judgment in favor of the United States is unwarranted.

2. Since the United States is not involved in the third-party claims, we express no views as to the correctness of their disposition below.

CONCLUSION

The petition for a writ of certiorari and motion to refer the case back to the Fifth Circuit, should be denied insofar as they relate to the United States' claim against petitioners.

Respectfully submitted.

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